Supreme Court
of the United States

OCTOBER TERM, 1923.

No. 110

WILLIAM IRWIN,
Appellant,
vs.
SAM F. WEBB, County Treasurer, C. W. CUMMINS, County Assessor, L. M. LANEY, County Attorney, J. G. MONTGOMERY, County Sheriff, and J. W. BRADSHAW, W. K. BOWEN and C. W. PETERSON, County Supervisors of Maricopa County, State of Arizona,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Brief of Appellant

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Service of ..... copies of the within brief

this ..... day of September, 1921, from

Attorneys for Appellant, is hereby acknowledged.

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Dated this ..... day of 1921,

at ..... o'clock ..... M.

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Clerk of Supreme Court,

By .....

Deputy.

IN THE

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BRIEF OF APPELLANT.

PRELIMINARY STATEMENT

The above entitled suit was brought on December 13th, 1919, in the United States District Court for the District of Arizona, by William S. Irwin, a citizen of the State of California, in his own behalf and on behalf of Reclamation Homestead Entrymen Taxpayers of the Salt River Reclamation project, Maricopa County, State of Arizona, against Sam F. Webb, County Treasurer;

C. W. Cummins, County Assessor; L. M. Laney, County Attorney; J. G. Montgomery, County Sheriff; and J. W. Bradshaw, W. K. Bowen and C. W. Peterson, County supervisors of said County of Maricopa, State of Arizona. They being the taxing authorities of said County and State, to restrain said County authorities and their successors in office from assessing, levying or collecting taxes against the United States homestead lands of the plaintiff and others similarly situated, previous to the making of final proof by them and the issuance of final certificates therefor, by the proper officers of the land department of the United States Government. Following the overruling of motions to strike portions of defendants' answer, and motion of plaintiff for judgment on the pleadings, the case was submitted to the Court for decison upon the pleadings and an agreed statement of facts, resulting in a decree of the United States District court for the District of Arizona, made March 13th, 1920, dismissing plaintiffs bill of complaint upon the merits. From the rulings of the Court and the decree made and entered, an appeal was prayed and the same being allowed, the case was brought to this court.

STATEMENT OF FACTS
Plaintiffs Complaint

Substance of the Complaint.

The appellant herein who was plaintiff in the trial court,in his complaint alleged in substance:

Jurisdictional Facts

1. That he, a citizen of the State of California brought his suit in behalf of himself and certain enumerated RECLAMATION HOMESTEAD ENTRYMEN TAXPAYERS of the Salt River Project in Maricopa County, State of Arizona and their assigns similarly situated, against the County Treasurer, Coun-

ty Assessor, County Attorney, County Sheriff and the Board of Supervisors of said county and state.

2. That the plaintiff and others similarly situated in whose behalf the suit was brought, had made entry of homesteads under the homestead laws of the United States relating to homestead entries within reclamation projects in the United States Reclamation Project known as the "Salt River Project"; that the defendants are the duly elected, qualified and acting taxing authorities of Maricopa County, State of Arizona and entrusted by the laws of that state with the assessing levying and collection of state and county taxes.

3. That his suit arises under the Constitution and laws of the United States, particularly Article IV and the XIV Amendment of said constitution, and the laws relating to the disposition and sale of public lands and defining the privileges and immunities of homesteaders deriving title from the United States Government, in that the acts and proceedings of the defendants complained of would, if permitted, abridge the privileges and immunities of the plaintiff as a citizen of the United States, and said acts and proceedings, if permitted, would abridge and deny to the plaintifff, within the State of Arizona, the equal protection of the laws, cloud the title of the plaintiff's homestead entry, and the homestead entry titles of said person similarly situated, and jeopardizes, interferes with, and injures the title of this plaintiff to said homestead and the titles of said persons similarly situated to their respective homesteads, and involves the right of said county officials to assess, tax, levy upon and sell for satisfaction of liens United States Government Homestead Lands, to deliver a conveyance therefor before the issuance of Final Certificate of Patent therefor, and is a suit between citizens of different states, and that the amount in controversy herein exceeds the sum of three thousand dollars ($3,000.00) exclusive of interest and costs.

Lands Involved

4. That on or about the year 1872 the lands and premises hereinafter described as being in Maricopa County, State of Arizona, then the Territory of Arizona, became subject to entry under public land laws of the United States, and among others subject to entry under the General Homestead Law as provided by the Act of May 20, 1862, and Acts amendatory thereof and supplementary thereto.

5. That under and by virtue of said Act of May 20, 1862, and Acts amendatory thereof and supplementary thereto, the Secretary of the Interior Department of the United States Government was and is authorized to perform any and all acts and to make such rules and regulations as may be necessary or proper for the purpose of carrying out the provisions of said Acts.

6. That pursuant to said authority the Secretary of the Interior prescribed rules and regulations relating to homestead entries under said general homestead law under the title of "Suggestions to Homesteaders and Persons Desiring to make Homestead Entries", which said regulatons are referred to and made part of his complaint.

Provisions of Ordinary Homestead Law

7. That said Acts, rules and regulations provide, among other things:

That every person who is the head of a family, or has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such as required by the Naturalization Laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, to be selected in and be in conformity with the legal subdivisions of the public lands, by applying to enter said lands and making and subscribing before a proper officer and in a proper Land Office of the

United States an affidavit showing that he or she is qualified to make said entry.

Every person making a homestead entry under said public land laws and regulations is required, among other things, to establish a residence upon the tract of land entered within six months after the date of entry, and maintain a residence thereon for a period of not less than three years, and to cultivate said land for a period of at least two years; to submit final proof within five or seven years from date of entry as to residence, cultivation and improvement, first giving notice of the time and place for submission of final proof as required by said laws and regulations.

Departmental Jurisdiction

8. That thereafter the said public land laws were further amended and supplemented by the Act of June 17, 1902, commonly known as the "Reclamation Act".

9. That said Reclamation Acts, and Acts amendatory thereof and supplementary thereto, provides for the withdrawal of public lands from all forms of entry except under homestead laws, and except when subject to the provisions ,limitations, charges, terms and conditions of said Reclamation Act and Acts amendatory thereof and supplementary thereto.

10. That under and by virtue of said Reclamation Act and Acts amendatory thereof and supplementary thereto, the Secretary of the Interior was and is authorized to perform any and all acts and to make such rules and regulations as may be necessary or proper for the carrying out of the provisions of said acts.

11. That pursuant to said authority the Secretary of the Interior, upon the passage of said Acts, prescribed rules and regulations relating to reclamation homestead entries within Reclamations Projects of the United States in a general circular known as "General

Reclamation Circular", which said regulations are referred to and made a part of his complaint.

U. S. Reclamation Law

12. That under said Reclamation Act and amendments and supplements thereto, and the rules and regulations prescribed thereunder, the Secretary of the Interior Department of the United States Government is authorized and empowered to determine the area of lands for which one person may obtain title under said Acts and regulations in each and every reclamation project.

13. That each entry is subject to readjustment by said Secretary of the Interior, and that said Secretary of the Interior is not required to confine any Farm Unit established by him to the limits of any entry theretofore made, but may combine any legal subdivision thereof with any contiguous tract lying outside of said entry.

14. That homestead entrymen within reclamation projects are precluded from making final proof and from receiving final certificates or patent until said Secretary of the Interior shall have determined the Farm Unit for such reclamation project.

15. That each homestead entryman under said reclamation Act is required to conform his entry to such Farm Unit as may be established by the said Secretary of the Interior.

16. That in addition to the acts and things required of homestead entrymen under the General Homestead Law, homestead entrymen on lands lying in irrigation projects are required to clear the land entered by, or assigned to them of brush, trees and other incumbrances, to provide the same with sufficient laterals for its effective irrigation, to grade the same and put it in proper condition for irrigation and crop growth, to plant, water and cultivate during at least two years next

preceding the time of filing the Final Affidavit hereinafter mentioned at least one-half of the irrigable area of his entry, and to grow satisfactory crops thereon.

17. That under said reclamation acts and regulations no Final Certificate can be issued until the doing of all the things enumerated under said Acts and regulations, particularly the acts and things herein mention.

Essential Conditions

18. That in addition to the proof required under the general homestead laws of the United States homestead entrymen upon homesteads within any reclamation project are required, as appears from said acts and regulations and Form of Notice of acceptance of Proof of Homestead residence issued by the U. S. Land Office officials, copy of which is attached, marked plaintiff's Exhibit "A" and made a part of his complaint; to submit to the United States Land Office in which such reclamation project is located an affidavit, corroborated by two witnesses, showing that the land entered by him, or assigned to him, has been cleared of brush, trees and other incumbrances, provided with sufficient laterals for its effective irrigation, graded and otherwise put in proper condition for irrigation and crop growth, planted, watered and cultivated, and during at least two years next preceding the date of filing of said Final Affidavit that satisfactory crops have been grown on at least one-half of the irrigable area thereof, and that the crops produced upon said premises are equal to the crops raised upon adjacent lands similarly situated.

19. That said entryman is further required before the issuance of Final Certificate to pay to the Land Office officials of the proper land office the sum of $1.50 for each legal subdivision included in each farm unit, together with all water charges due thereon.

Final Proof and Certificate

20. That upon the compliance with the requirements of said Reclamation Acts and regulations Final Certificate, form of which is attached and marked Plaintiff's Exhibit "B", is issued to said Reclamation Homestead entrymen or assigns, reserving a lien to the United States Government for charges to become due for the irrigation works supplying said irrigation project with water, and that thereafter patent for said land issues to such entrymen or assigns containing like reservations of a lien to the United States Government.

Withdrawal of Land

21. That on the 17th day of July, 1902, the Secretary of the Interior withdrew the lands and premises hereinafter described, lying and being in Maricopa County, State of Arizona, from all entries except homestead entries under the Act of June 17, 1902, and Acts amendatory thereof and supplementary thereto, and the regulations promulgated thereunder.

22. That thereafter, to-wit, on the 25th day of June, 1904, said lands were incorporated in that certain reclamation project established under and by virtue of said Act of June 17, 1902, and Acts amendatory thereof and supplementary thereto, and designated the "Salt River Project."

Admission of Arizona

23. That on the 14th day of February, 1912, the Territory of Arizona was admitted into the Federal Union by Enabling Act approved June 20, 1910, whereby the lands and property belonging to the United States of America or reserved for its use were exempted from taxation.

Entry of Homestead Lands Involved

24. That this plaintiff and said homesteaders among others similarly situated made entry of the

various tracts of land involved herein and described in that certain list attached and marked plaintiff's exhibit "C" and made part of his complaint; and that this plaintiff and said homestead entrymen similarly situated fully and truly in every particular complied with the requirements of said general homestead laws and said reclamation homestead laws, and made entries for the respective entries therein described, and proofs regarding the same and assignments thereof, and affidavits and proofs relating thereto, upon the dates therein mentioned, which lands are of the value therein stated, and that the assignees of said entrymen fully and truly in every particular complied with the requirements of said general homestead law and said reclamation homestead law, and made the affidavits and proofs at the respective times therein mentioned and stated, and said tracts of land are of the value therein set forth, and that the assessments therein stated are the assessments, made and taxes levied against and upon said premises by the county authorities of the County of Maricopa, State of Arizona, as therein set forth.

Homestead Lands Assessed and Taxed

25. That after the incorporation on said lands within the Salt River Project, to-wit, on the 25th day of June, 1904, and the establishment of said lands as reclamation homestead entries, to-wit, during the years, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918 and 1919, and before the issuance of Final Certificates or patents for said lands, the County authorities of Maricopa County, State of Arizona, (then the Territory of Arizona) duly assessed said lands described in plaintiff's Exhibit "C" for State and County taxes for said County and State aforesaid, and thereafter the Board of Supervisors of said County and State duly levied a tax against the various tracts of land described in plaintiff's said Exhibit "C" which taxes were duly entered upon the public tax records of

said County and State and duly declared a lien upon said lands.

26. That thereafter each year during the continuance of the territorial status of said State of Arizona, and following the admission of said Territory as a State into the Federal Union, said County and State authorities duly and annually assessed and levied taxes against said premises for each and every one of said years; that said taxes were thereafter duly entered upon the public tax record of Maricopa County, State of Arizona, and by said authorities and under and by virtue of the laws of the State of Arizona duly declared to be a lien upon said lands.

Salt River Project Farm Unit Established

27. That on said 18th day of January, 1917, the Secretary of the Interior Department of the United States Government established Farm Units within the Salt River Project under said Reclamation Act of June 17, 1902, and the regulations issued thereunder and ordered and required all homestead entrymen within two years from the date thereof to conform their entry to such Farm Unit.

Taxes Demanded Annually

28. That the County Assessor, Board of Supervisors, County Attorney, County Sheriff and County Treasurer, of Maricopa County, State of Arizona, defendants above named, despite the fact that final proof had not been made thereon, and despite the fact that no affidavit of proof of reclamation, improvement or irrigation relating thereto had been made, or fees paid thereon, and that no Final Certificate had been issued therefor, annually levied and assessed State and County Taxes against said lands, and the whole thereof, and demanded the payment of said taxes from this plaintiff and said entrymen herein mentioned and their assigns among others for each and every year

mentioned and in the amounts set forth in plaintiff's Exhibit "C."

Possession Claimed Under Federal Laws

29. That this plaintiff and said Homestead Entrymen among others similarly situated claim possession and the right to perfect title to their respective tracts of land described in plaintiff's said Exhibit "C," under the homestead laws of the United States governing homesteads in Reclamation projects and that said county authorities assert and claim authority to assess and levy said taxes under the Tax Laws of the States of Arizona, to create liens thereon and to sell premises to satisfy said liens and to deliver conveyances to the purchasers thereof.

Tax Exemptions Claimed

30. That said premises and the whole thereof are exempt from taxation and sale for taxes under the constitution and laws of the United States until the making of final proof and the issuance of Final certificates therefor by the proper Department of the United States Government.

Injuries Threatened

31. That said defendants deny said exemption and are preparing and threatening to, and unless restrained will irreparably injure and damage this plaintiff and said Homestead Entrymen similarly situated by assessing and levying additional taxes against the said lands of this plaintiff and the lands of similarly situated Homestead Entrymen among others described in plaintiff's said Exhibit "C"; by collecting said taxes heretofore levied against said premises; by instituting suits for the enforcement and collection of said taxes heretofore levied, and for the enforcement and collection of taxes proposed to be assessed and levied by them; and by selling said lands under the law of the

State of Arizona relating to delinquent taxes, and delivering deeds to the purchasers of said lands under said tax sales.

32. That said defendants are preparing and threatening to and unless restrained will irreparably damage, injure, jeopardize and destroy plaintiff's interest, and the interest of said Entrymen similarly situated, in and to their said respective lands; prevent the perfection of plaintiff's title and the title of said entrymen similarly situated to their said lands and create and cast a cloud upon the title to said lands by instituting numerous and harrassing suits for the collection of present taxes assessed and levied, and future taxes which the defendants are preparing and threatening to assess and levy; by declaring said taxes a lien upon said lands; by selling said lands for the satisfaction of said tax liens; by casting clouds thereon and by delivering deeds of conveyance to purchasers thereof, all which acts defendants threaten and are prepared to carry out before the making of final affidavit or the issuance of final certificate for said lands.

Value of Lands

33. That said premises of this plaintiff are of the value of $10,000.00 and that the total value of said premises herein described as known to plaintiff is in excess of $408,000.00.

34. That the total amount of taxes so assessed and levied against the premises of this plaintiff is the said sum of $3,228.36 and that the total taxes assessed against said premises known to plaintiff is in excess of $24,811.18 exclusive of interest and costs.

Without Remedy

35. These allegations were followed by appropriate allegations of the lack of recourse against said county officials for any cloud cast upon homestead titles or taxes collected or damages sustained, setting

forth the inadequacy of a remedy at law and that irreparable injury which could not be compensated for in damages would follow from the acts of the defendants if not restrained.

Prayer

36. Plaintiff prayed that the defendant taxing authorities be enjoined and restrained from in any way or manner enforcing or attempting to enforce the collection of any taxes assessed or levied against the homesteads in question prior to the making of Final Proof and the issuance of final certificate therefor by the officers of the proper department of the United States Government for the declaration of taxes previously assessed against the land as illegal, void and unenforceable and the removal of such tax liens as a cloud from the title of said entrymen and the quieting of their titles as against taxes theretofore assessed or levied.

37. Attached to plaintiff's complaint was copy of an instrument described as "Notice of Acceptance" customarily issued by the United States Land office when proof of residence had been made and which notice precedes the issuance of Final Certificate.

38. Following this there was set forth as Exhibit "B" the usual form of "Final Certificate" issued when proof has been made of full compliance with the requirements of the homestead law.

39. This is followed by a descriptive list of all of the homestead lands involved in the suit with names of owners, the Land Office records regarding each, the date of tax assessments against such lands, and the amounts thereof. (Printed Record pp. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.)

The homesteads involved herein had originally consisted of one hundred sixty acre tracts. The land desert in character had to be cleared of desert growth, levelled

and provided with the necessary irrigation ditches and laterals for its successful irrigation and cultivation.

The taxes were assessed against the entire entry as it stood in the name of the original entrymen and taxes for the entire amount assessed against the whole tract as originally entered without regard to assessments made to assignees, competent to perform the requirements for the earning of title under the reclamation homestead law. As the assignments incidental to the reduction of the farm units came to the notice of the taxing authorities, the tract so assigned was assessed to the assignee but in many instances the entire tract was continuously assessed to the original entrymen without regard to assignments.

The land may there be divided into the following classes:

I. Entries which have not as yet been sub-divided as required for the reduction to the proper farm unit.

II. Entries which have been reduced to the farm unit—40 acres being retained by the original entrymen and the balance of the entry being assigned by the entrymen to qualified assignees.

III. Entries which have been assigned in their entirety before reduction to the farm unit.

IV. Entries which have been secured by virtue of successful contests instituted in the United States land office.

All of the entries partake of the same characteristics in that final proof has not been made for any of them, nor have the fees due the Government thereon, been paid, or the final receipt issued by the Government therefor.

ANSWER

Denies Exemptions of Homesteads

The defendants answered in substance:

Admissions.

40. Admits all of the material allegations of the plaintiff's complaint.

Denials

41. Denies that the land described in plaintiff's complaint was exempt from taxation by the State of Arizona and denies that their actions in assessing, levying and collecting taxes upon the equities, interests of the plaintiff and others similarly situated, if permitted, would abridge or deny to the plaintiffs or any of said persons the equal protection of the laws, or cloud or jeopardize the titles of plaintiff or any persons similarly situated, or in any manner injure or damage the plaintiff or any such other persons.

Alleges Proof of Residence Authorizes Taxes

42. Defendants allege that at the time the taxes complained of were assessed for each tract of land in thecomplaint described, proof of residence, cultivation and improvements had been made, that said lands were in a high state of cultivation and had produced valuable crops; that the market value of the lands was of the sum of $300.00 per acre; and that such land was legally taxable.

Sets Up Change of Tax Records

43. Defendants further alleged:

a. That subsequent to the service of process upon the defendants in the above entitled cause and on, to wit, the 5th day of January, 1920, in order to make it doubly certain that there was no attempt to levy or collect any taxes upon the interest of the United States in any of the reclamation homestead lands described and referred to in the plaintiff's bill of complaint, the Board of Supervisors of Maricopa County, Arizona, being duly authorized by law to cause any errors in the tax records of the County to be corrected, did

duly and regularly pass and adopt a resolution worded as follows, to-wit:

b. "Whereas, the Treasurer of Maricopa County, has reported to the Board of Supervisors of Maricopa County that the assessment for taxation of certain lands within the Salt River Reclamation Project upon each tract of which the Government's notice of acceptance of proof of homestead residence, but for which no patents had issued prior to such assessment, as said assessments appear upon the record of his office are in such form that they might be construed as erroneously attempting to assess the interest of the United States Government in said tracts of land; and

c. "Whereas, it has at all times been the intention of the assessor and all other officers having to do with the assessment and levying of taxes upon property in Maricopa County ,to tax only the interest of the respective entrymen, or their assignees, in the lands embraced in said reclamation homesteads, and not to assess, levy or collect any taxes upon the interest of the United States Government in any of said lands.

d. "Now, therefore, be it resolved by the Board of Supervisors of Maricopa County, that the Treasurer and Ex-Officio Tax Collector of Maricopa County, be, and he hereby is, directed to correct his records of all assessments and levies of taxes upon lands within the Salt River Reclamation Project made prior to issuance of patent but subsequent to issuance of notice of acceptance of proof of homestead residence, cultivation and improvements, by inserting in the records of said assessments and levies of taxes immediately preceding the description of the property assessed in each instance, the words "Equity in," so that the records of said assessments and levies will show that only the equity of the entryman, or his assignee, in each instance is taxed; the said Board of Supervisors hereby disclaiming on behalf of Maricopa County and the

State of Arizona any intention to assess, levy or collect any taxes upon the interest of the United States Government in said reclamation homestead lands, or any part thereof."

44. That immediately thereafter pursuant to the directions of said resolution the Treasurer and ex officio Tax Collector of said Maricopa County did correct the tax records of said County accordingly, so that now the tax records of said County clearly show that only the equities of the plaintiff and other persons similarly situated in their respective reclamation homestead lands are taxed. (Printed Record pp. 22, 23, 24, 25, and 26.)

PLAINTIFF'S MOTION TO STRIKE OUT PARTS OF ANSWER

45. January 17, 1920 the plaintiff moved to strike out a portion of defendants' answer. (Printed Record p. 27.)

46. Subsequently, on March 11th, 1921, filed an amended motion to strike out the following parts of defendants' answer for the reason that allegations therein contained failed to set forth matter sufficient to disentitle the plaintiff to the relief sought in his bill theretofore filed in this suit, and for the reason that said portions of said answer and each and all of them are incompetent, irrelevant and immaterial and are insufficient in law to constitute any defense to the bill of the plaintiff filed herein.

47. The portions sought to be stricken and their relation to other parts of the answer are as follows:

(Printed record pages 28 and 29. Portions sought to be stricken printed in Italics.):

* * * * * * * * *

a. "The defendants further allege upon information and belief that as to each tract of land described or referred to in the plaintiff's bill of complaint, the

entryman thereof had filed with the commissioner of the General Land Office, satisfactory proof of residence, improvements and cultivation for the five years required by law, and said proof had been accepted by the proper land office officials, and notice of such acceptance duly issued, before any of the taxes complained of in the plaintiff's bill of complaint were assessed or levied thereon *and that by virtue of the premises, at the time of assessing and levying said taxes, the plaintiff and other persons similarly situated had a substantial and valuable, and the defendants are informed and believe, a taxable, equity and interest in their respective reclamation homestead lands.*

* * * * * * * * *

VI.

b. *"The defendants deny upon information and belief that the property against which the tax liens complained of in the plaintiff's bill of complaint are assessed, is, or at the time of the assessment thereof was, exempt from taxation by the State of Arizona under the constitution or laws of the United States, or the Enabling Act whereby the State of Arizona was admitted into the Union of the States, or at all."*

c. "The defendants admit that they intend to enforce by all lawful ways and means the collection of the taxes complained of in the plaintiff's bill of complaint against the respective equities of the paintiff and other persons similarly situated, and that the proper officers of said County of Maricopa intend in the future, unless this Honorable Court should otherwise direct, to continue regularly to tax the equity and interest in said lands of said plaintiff and other persons similarly situated; *but the defendants deny upon information and belief that their actions in assessing, levying and collecting taxes upon the equities and interests of said persons in their respective lands, would, if permitted, abridge any of the privileges or immuni-*

ties of the plaintiff, or others similarly situated as citizens of the United States; deny upon information and belief that said acts or proceedings, if permitted, would abridge or deny the plaintiff, or any of said other persons, the equal protection of the laws; and deny upon information and belief that the assessing, levying or collection of taxes upon the lands referred to in the plaintiff's bill of complaint, would or does in any manner wrongfully cloud or jeopardize the title of the plaintiff, or any of the other persons similarly situated, to their said lands, or in any manner injure or damage the plaintiff or any of said other persons."

VIII.

* * * * * * * * *

IX.

d. *"And further answering the plaintiff's bill of complaint the defendants say that said bill of complaint fails to allege any matter of equity entitling the plaintiff, or any of the other persons therein referred to as similarly situated, to the relief prayed for therein, or to any relief at all;* and particularly that it appears from said bill of complaint that the taxes therein complained of were assessed and levied upon each tract of land therein described and referred to, subsequent to due proof of homestead residence, cultivation and improvements by the entryman in whose homestead entry said tract of land was embraced; and that the property so taxed was at the time of such taxation legally taxable."

MOTION DENIED

48. Plaintiffs' motion being by the Court denied, and leave to reply being granted, the plaintiff replied to defendants answer as follows:

PLAINTIFF'S REPLY

49. Denied that the plaintiff or any other per-

sons similarly situated had at the time of levying of the taxes in question or any time, any taxable equity or any interest in the homestead land concerned or any right thereto except such as belonged to them under the United States Homestead laws as homestead entrymen.

Land, Not "Equity" Taxed

50. Denies that the defendants, in assessing or levying the taxes complained of in the plaintiff's bill of complaint, assessed or levied taxes upon or against only the respective equities in the lands described and referred to in plaintiffs bill of complaint, but on the contrary, alleges that said defendants, during each and every year alleged in plaintiff's bill of complaint did assess and levy the taxes complained of against said homestead lands and each and every tract described in plaintiff's bill of complaint on file herein, in the same manner as said defendants assessed, and levied taxes against lands in private ownership and to and in which private persons had a vested nterest, and prepared, made and kept a record of their proceedings, showing such assessment and taxation as herein alleged, and did file and institute and prosecute suits for the collection of taxes against various tracts of land described in plaintiff's said bill of complaint previous to the bringing of this suit by this plaintiff.

No Authority To Change Records

51. Denies that said defendants, or any of them, were duly authorized, or at all, by law or otherwise, to change the tax or assessment records of Maricopa County, State of Arizona, or to levy or assess any taxes against the plaintiff, or other persons similarly situated, or upon or against the homestead rights of the plaintiff, or any other persons similarly situated, or to pass the alleged resolution set forth in defendants answer, on file in this cause, in the manner or at the time alleged, or at all; and the plaintiff further denied that the

alleged action of said defendants on January 5, 1920, was designed or constituted a correction of any errors in the tax records of Maricopa County, State of Arizona, and denies that said records contained any error in respect to the taxation of the lands mentioned in plaintiff's bill of complaint and alleges that said action of said defendants constituted a change of the tax records of said county and not a correction of any errors therein contained.

52. Denies that said defendants had, or have, any right or authority under the laws of the State of Arizona, or otherwise, to levy or assess any taxes against any property of the plaintiff, or other persons similarly situated, in the manner, or at the time alleged in the said defendants' Answer.

53. Denies that the tax records of Maricopa County, State of Arizona, now show that only the equities of the plaintiff, and other persons similarly situated, in their respective Reclamation Homestead lands are taxed, and alleges in this respect the tax records of said county show that the lands mentioned and described in plaintiff's bill of complaint are taxed in the same manner as any other real property in said county.

Taxation Interference With Operation Of U. S. Homestead Law

54. Plaintiff further replying to said Answer says: That neither the plaintiff, nor as he is informed and believed, do any other person similarly situated, seek to avoid the payment of any construction, betterment or maintenance costs chargeable against any of the said land described in plaintiff's bill of complaint under the United States Reclamation Law, nor any tax assessed or levied against said lands by the authorized tax authorities of the State of Arizona, after the fixing of the Farm Unit by the Secretary of the Interior, and a reasonable time thereafter for compliance

with the United States Reclamation Law, as to such cultivation, irrigation, improvement and raising of crops, neither your orator or any persons similarly situated, could, or can, comply with said Reclamation Homestead Law, or establish proof of compliance therewith; and alleges that pending the fixing of said Farm Unit and the expiration of a reasonable time thereafter for compliance with said law, said lands were exempt from taxes complained of; and that the assessing and levying of said taxes previous to such time constituted an interference with the power of Congress to dispose of and make needful rules and regulations respecting the territory or other property belonging to the United States, under Article IV, United States Constitution, and was, is and constituted an interference with the sovereignty of the United States in that said lands so taxed were, and until the making of final proof, remained the property of the United States Government, and as such was exempt from taxation.

Tax Exemption Claimed

55. That plaintiff, and all persons similarly situated, claim exemption from taxation by the county authorities of Maricopa County, State of Arizona, against the premises described in plaintiff's bill of complaint, filed herein, under the Reclamation Homestead laws of the United States until the fixing of the Farm Unit within the Salt River Valley Project by the United States Secretary of the Interior, and a reasonable time thereafter for compliance with the Reclamation Homestead Law, and alleges that the acts of said defendants constitute an interference with, and an abridgment of the rights, privileges and immunities of the plaintiff and persons similarly situated under Article IV and the Fourteenth Amendment to the Constitution of the United States, and the laws relating to transfer and sale of public lands.

State Statutes Unconstitutional

50. Plaintiff in further reply says that the Constitution and laws of the State of Arizona relied upon, and particularly Chapters 3, 4, 5, 6, and 7 of the Revised Statutes of the State of Arizona, 1913, and amendments and supplements thereto, and invoked applied, construed and relied upon by said defendants for the taxation of said lands of the plaintiff and persons similarly situated, are in contravention of the Constitution and statutes of the United States, particularly Article IV of the Constitution, and the Fourteenth Amendment thereof, the United States Reclamation Homestead Law, and the sovereign exemption of the United States Government property from taxation by state authorities.

MOTION FOR JUDGMENT ON THE PLEADINGS

50. On March 1st, 1920, plaintiff filed his motion for judgment on the pleadngs filed in this suit for the following reasons:

Answer Sets Up No Defense

a. That the acts of said defendants in assessing, levying, collecting and attempting to collect taxes against said lands constitute an interference with and an abridgment of the rights, privileges and immunities of the plaintiff and persons similarly situated under Article IV of the United States Constitution and the Fourteenth Amendment to the Constitution of the United States, and the laws of the United States relating to the transfer and sale of public lands of the United States.

b. That the acts of said defendants in assessing, levying, collecting and attempting to collect taxes against said lands are asserted under Chapters 3, 4, 5, 6 and 7 of the Revised Statutes of the State of Ari-

zona, 1913, and amendments and supplements thereto, and that said statutes are in contravention of the Constitution and statutes of the United States, particularly Article IV of the United States Constitution and the Fourteenth Amendment thereof, and the United States Reclamation Homestead Law and the sovereign exemption of the United States Government property from taxation.

c. That the acts of said defendants, if permitted, will cast a cloud upon the prospective titles of this plaintiff and persons similarly situated to their said lands contrary to Article IV of the United States Constitution and the Fourteenth Amendment thereof, and the United States Reclamation Homestead law.

d. That the acts and threats of the said defendants in assessing, levying, collecting and attempting to collect said taxes are illegal and contrary to the Constitution and laws of the United States in such cases made and provided. (Printed Record pp. 34 and 35.)

AGREED STATEMENT OF FACTS

Motion for judgment on the pleadings being denied, the case was submitted to the Court upon the pleadings in the case and an agreed statement of facts in substance as follows:

Jurisdictional Facts

It is hereby stipulated and agreed by and between the plaintiff and defendants in the above entitled cause, the said cause may be submitted to the Court for decision upon the following statement of facts:

1. That the plaintiff, William Irwin, is and at the time of the institution of this suit was, a citizen of the State of California, and a resident of the City of Ontario, in the County of San Bernardino, in said State of California; that he brings this suit in his own behalf, and in behalf of the reclamation homestead entrymen and their assignees, and others similarly

situated who may desire to avail themselves to the benefits thereof, set forth in plaintiff's Exhibit C, attached to his bill of complaint filed in this cause.

2. That Sam F. Webb is the duly elected, qualified and acting County Treasurer; C. W. Cummins, the duly elected, qualified and acting County Assessor; L. M. Laney, the duly elected, qualified and acting County Attorney; J. G. Montgomery, the duly elected, qualified and acting County Sheriff; and J. W. Bradshaw, W. K. Bowen and C. W. Peterson are the duly elected, qualified and acting County Supervisors of said County of Maricopa, in the State of Arizona; that each and all of said officials are residents of said County of Maricopa, and citizens of said State of Arizona, and are the persons authorized, designated and entrusted by the laws of the State of Arizona, with assessing, levying and collecting state and county taxes upon taxable property situated within said Maricopa County.

3. That this suit arises under the constitution and laws of the United States, particularly Article IV and the XIVth amendment of said constitution of the United States, and the laws relating to the disposition and sale of public lands, and defining rights, privileges and immunities of homesteaders deriving title from the United States government, and involves the right of said county officials to assess, tax, levy upon and sell for satisfaction of liens under the statutes of the State of Arizona, United States Government Homestead Lands, and to deliver a conveyance therefor and possession thereof before the issuance of Final Certificate or Patent therefor, as more fully hereinafter set forth, and is a suit between citizens of different States, and that amount in controversy herein exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

Land Subject to Ordinary Homestead Entry

4. That on or about the year A. D. 1872, the land, the taxation of which is in question in this suit, became subject to entry under the public lands of the United States, including the general homestead law, to-wit; the Act of May 20th, 1862 and acts amendatory thereof and supplementary thereto.

Departmental Regulations

5. That pursuant to authority in him vested by law, the Secretary of the Interior has prescribed rules and regulations relating to homestead entries under said general homestead law, which rules and regulations have been embodied in that pamphlet entitled "Suggestions of Homesteaders and Persons Desiring to make Homestead Entries," which said regulations are hereby referred to and made a part of as fully as if incorporated herein.

6. That in further pursuance of the authority in him vested by law the Secretary of the Interior has prescribed rules and regulations relating to homestead entries within United States reclamation projects, which said rules and regulations have been embodied in a circular known as "General Reclamation Circular," which said circular is hereby referred to and made a part hereof as fully as if incorporated herein.

7. That pursuant to law and the rules and regulations of the Department of the Interior, when a person who has made homestead entry of land within a reclamation project, has made satisfactory proof of the appropriate United States Land office of the residence, cultivation and improvements required by the ordinary provisions of the Homestead Law, there is issued to him by the General Land Office, a notice of acceptance of such proof of which said notice the following is a specimen, to-wit:

"Notice of Acceptance

Received Jan. 26, 1914, U. S. Land Office, Phoenix, Ariz.

Department of Interior,
General Land Office,

Washington, D. C. Jan. 21, 1914

Notice of Acceptance of proof of Homestead Residence, Cultivation and Improvements.

Mr. Samuel L. Brown,
Mesa, Arizona.

(Through Register and Receiver, Phoenix, Arizona.)
Sir:

You are advised that the final proof submitted by you on Homestead Entry No. 1090, Serial No. 03911, made Oct. 25, 1907, subject to the Act of June 17, 1902 (32 Stat. 3883), for the N. W. 1-4 S. E. 1-4 Section 1, Township 1 N. Range 5 E., Meridan G. & S. R. has been examined in this office and found to be sufficient as to the residence, cultivation and improvements required by the ordinary provisions of the homestead law. Further residence on the land is not required in order to obtain patent, and final certificate and patent will issue upon proof that at least one half of the irrigable area in the entry, as finally adjusted has been reclaimed, and that all the charges, fees and commissions due on account, thereof and all water right charges have been paid to the proper receiving officer of the Government. If the entrymen desire a patent before all water-right charges assessed against the land have been paid in full, a patent will be issued upon proof of reclamation and payment of all water-right charges due at the date of patent, and a lien will be retained under the Act of August 9, 1912 (37 Stst. 265) for unpaid charges.

Very respectfully,

C. M. BRUCE,

Assistant Commissioner.

If this entry does not conform to a farm unit until as established by the Department, notice is hereby expressly given that the entry is subject to be conformed and its area thereby reduced. This conformation to a farm unit may be effected by assignment of the excess acreage." charges and the patent to be issued hereon will reserve to has made payment in full for Lot 4 or S. W. 1-4 S. W. 1-4 (Farm Unit "J") Section 31, Township 1 S., Range 4 E., G & S. R. B. & Meridan, Arizona, containing 36.14 acres.

8. That homestead entrymen within reclamation project precluded from making final proof and from receiving final certificate or patent until said Secretary of the Interior shall have determined the Farm Unit for such reclamation project.

9. That upon full compliance with the requirements of the reclamation acts and the regulations duly promulgated thereunder "Final Certificate" is issued to the reclamation homestead entryman, or his assignees, of which certificate the following is a specimen, to-wit:

"Department of the Interior

United States Land Office, Phoenix, Arizona.

H. R. P.

Serial No. 036446.

Receipt No. 2, 359, 828.

Final Certificate.

Homestead, Act 6-17-02.

This certificate does not cover payment of water-right charges and the patent to be issued hereon will reserve to the United States a lien for the payment of such charges.

October 6, 1919.

It is hereby certified that, pursuant to the provisions of Section 2291, Revised Statutes of the United States, Gertrude F. Standage, % M. J. Dougherty, Mesa, Arizona, has made payment in full for Lot 1 or S. W. 1-4 S. W. 1-4

(Farm Unit "J") Section 31, Township 1 S., Range 4 E., G. & S. R. B. & Meridan, Arizona, containing 36.14 acres.

Now therefor, be it known that on presentation of this certificate to the Commissioner of the General Land Office, that said Gertrude F. Standage shall be entitled to receive a Patent for the land above described is all then be found regular.

J. L. IRVIN,
Register.

NOTE—A duplicate of this Certificate is issued to the claimant as notice of the acceptance of the proof and payment, and of the allowance of the entry by the Register and Receiver.

The original is forwarded to the General Land Office with the entry papers for approval by the Commissioner of the General Land Office and issuance of patent.

The duplicate copy forwarded to the claimant should be held until notice of issuance of patent is received.

In all correspondence concerning the entry in connection with which this certificate is issued, refer to the name of the Land Office and the Serial Number noted hereon.

Posted . . in Vol .
by Div. "O".
Approved . .
By
Division

Location of Lands

10. That the lands described in the plaintiff's bill of complaint are situated in Maricopa County, State of Arizona; that on the 17th day of July, 1902, said lands were by the Secretary of the Interior withdrawn from all entries except homestead entries under the Act of June 17, 1902, and acts amendatory thereof and supplementary thereto, and the regulations promulgated thereunder and that thereafter, on the

25th day of June, 1904, said lands were incorporated in that certain reclamation project established under and by virtue of said Act of June 17, 1902, and Acts amendatory thereof and supplementary thereto, which said project was designated the "Salt River Project."

Performance by Entrymen

11. That the plaintiff and other similarly situated homestead entrymen as set forth in plaintiff's Exhibit C, attached to this bill of complaint, made reclamation homestead entry of the respective tracts of land; at all times to the present date fully complied with the requirements of the general homestead laws; made assignments of portions of their respective entries; all at the respective times and in the manner and form alleged in plaintiff's bill of complaint, and particularly set forth in said Exhibit C thereto attached; that the assignees of said entry men have also complied as far as possible up to the present date with the requirements of said reclamation acts and the rules and regulations promulgated thereunder; that taxes for the year, in the respective amounts and upon the respective parcels of land, all as set forth in the said Exhibit "C," attached to the plaintiff's bill of complaint, were assessed and levied by the officers of the County of Maricopa, State of Arizona, whose duty it was to assess and levy taxes upon property in Maricopa County; that in said Exhibit "C," attached to plaintiff's bill of complaint where the words "proof of residence" occur in the data there given concerning each tract of land said words mean and have reference to the proof by the entrymen of the homestead residence cultivation and improvements required by the provisions of the General Homestead Law.

Levy of Taxes

12. That thereafter each year during the continuance of the territorial status of said State of Ari-

zona, and following the admission of said territory as a State into the Federal Union, said County and State authorities duly and annually assessed and levied taxes against said premises for each and every one of said years; that said taxes were thereafter duly entered upon the public tax records of Maricopa County, State of Arizona, by the said authorities and under and by virtue of the laws of the State of Arizona duly declared to be a lien upon said lands.

13. That all the taxes complained of in the plaintiff's bill of complaint were assessed and levied at a time subsequent to the issuance by the Commissioner of the General Land Office of the "notice of acceptance of proof of homestead residence, cultivation and improvements," under the ordinary provisions of the general homestead law, a specimen of which notice is set forth in paragraph numbered 7, hereof, but prior to the payment of the $1.50 fee due the United States Government for each legal sub-division of said lands, prior to complete compliance with the Reclamation Homestead Law requirements or the issuance of "Final Certificate" thereof, of which the specimen is set forth in paragraph numbered 9 thereof, and prior to the issuance of patent for the land in question; that the assessments of said taxes upon some of said tracts of land were made as early as the year 1911, but that no assessments or levies of taxes were made upon any of said tracts of land, or any of the original entries from which any of said tracts of land were assigned, at any time prior to the issuance of the forementioned notice of acceptance of proof of homestead residence, cultivation and improvements, under the General Homestead Law. That the details of the assessment of said taxes upon the tracts of land described and referred to in the plaintiff's bill of complaint, as said assessments now appear upon the tax books of said Maricopa County, are contained in those certain "Back Tax Bills" which

are in evidence in this cause and marked defendant's Exhibit ....., which said Back Tax Bills are hereby referred to and made a part of this statement of facts the same as if they were fully incorporated herein.

Manner of Assessing Taxes

14. That in assessing and levying taxes upon said reclamation homestead lands, the officers of said Maricopa County described the same by legal subdivisions and assessed the same in the manner and at the same value as patented lands, subject to the same amount of United States Reclamation Project charges; that the records of such assessments were made and kept in the regular and usual way upon the assessment and tax records of said Maricopa County, and that as to nine (9) of the tracts of land described in the plaintiff's bill of complaint, suits were filed in the Superior Court of Maricopa County, State of Arizona, for the collection of said taxes, including among said suits a suit against the plaintiff herein for the collection of the taxes against his land complained of herein; and that that certain complaint in which the State of Arizona is plaintiff and Walter H. Harris and Paul Baxter Beville are defendants, is a true and correct specimen of the type of complaint so filed by said county authorities, as aforesaid. That in levying taxes upon said reclamation homestead lands and in so filing suit to enforce collection of said taxes, the tax officials of said Maricopa County at all times have claimed not to tax or attempt to enforce collection of taxes against any right, title, lien or interest of the United States of America, in or to said lands, or any part thereof, nor to interfere with the lien reserved by the United States Government on account of the reclamation of said lands; and that the defendants claim they will not in the future attempt to tax or enforce the collection of taxes against any interest in any of the lands described in the plaintiff's bill of complaint, other than

the interest and equity of the homestead entrymen, or their assigns.

Changing Records

15. That on the 5th day of January, 1920, and after the service of process upon the defendants in the above entitled cause, but before the defendants made an answer therein, the Board of Supervisors of said Maricopa County, State of Arizona, duly passed and adopted a resolution, worded as follows, to-wit:

"Whereas the Treasurer of Maricopa County has reported to the Board of Supervisors of Maricopa County that the assessments for taxation of certain lands within the Salt River Reclamation Project upon each tract of which the Government's notice of acceptance of proof of homestead residence, cultivation and improvements has issued prior to assessments, as said assessments appear upon the records of his office are in such form that they might be construed as erroneously attempting to assess the interest of the United States Government in said tracts of land; and

Whereas, it has at all times been the intention of the Assessor, and all other officers having to do with the assessment and levying of taxes upon property in Maricopa County, to tax only the interest of the respective entrymen, or their assignees, in the lands embraced in said reclamation homesteads, and not to assess, levy or collect any taxes upon the interest of the United States Government in any of said lands;

Now, therefore, be it resolved by the Board of Supervisors of Maricopa County, that the Treasurer and Ex-Officio Tax Collector of Maricopa County be, and he hereby is, directed to correct his records of all assessments and levies of taxes upon lands within the Salt River Reclamation Project made prior to issuance of patent but subsequent to issuance of notice of acceptance of proof of homestead residence, cultivation and improvements, by inserting in the records of said

assessments and levies of taxes immediately preceding the description of the property assessed in each instance, the words "Equity in," so that the records of said assessments and levies will show that only the equity of the entrymen, or his assignees, in each instance is taxed; the said Board of Supervisors hereby disclaiming on behalf of Maricopa County and the State of Arizona any intention to assess, levy or collect any taxes upon the interest of the United States Government in said reclamation homestead lands, or any part thereof."

That immediately upon the passage of said resolution and pursuant to the directions thereof, the Treasurer and Ex-Officio Tax Collector of said Maricopa County did insert immediately preceding each description of reclamation homestead lands upon which no final certificate had issued, the words "Equity in."

Terms of Office

10. That the defendants began their present respective terms of office on January 1, 1919; that the present term of office of said County Assessor is his first term of office; that said County Treasurer and Ex-Officio Tax Collector has held such office continuously since January 1, 1917; that the defendant W. K. Bowen has been a member of the Board of Supervisors of Maricopa County continuously since the month of August, 1915; that the defendant, C. W. Peterson has been a member of said Board of Supervisors continuously since January 1, 1915; and that J. W. Bradshaw has been a member of said Board of Supervisors continuously since January 1, 1917.

Farm Unit Established

17. That on the 18th day of January, 1917, the Secretary of the Department of the Interior of the United States established the farm units within the Salt River Project under said Reclamation Act of June

17th, 1902, and the regulations issued thereunder at forty acres and ordered and required all homestead entrymen within two years from the date of such establishment of farm units to conform their entries to such farm units.

Defendants To Enforce Collection of Taxes

18. That the plaintiff and said similarly situated homestead entrymen, and their assigns, claim possession to and the right to perfect title to their respective tracts of land described in Exhibit "C" attached to the plaintiff's bill of complaint, under the laws of the United States governing homesteads in reclamation projects, and that the defendants claim authority to assess and levy taxes under the laws of the State of Arizona upon and against all the right, title and interest of said entrymen, and their respective assigns, in and to said lands; to create liens upon said interests of said entrymen, or their assigns, and to sell and convey said interests to satisfy said liens, and to deliver conveyances and possession of said lands to the purchasers thereof. That the defendants are prepared to, and unless restrained by order of the Court will in the future assess and levy taxes upon the equity and interest of said entrymen, or their assigns, in said reclamation homestead lands, and will institute suits for the collection of said taxes unless the same are voluntarily paid, and will sell said interests and equities in said lands for the satisfaction of the tax liens created by them, and will deliver deeds conveying to the purchasers thereof the interests and equities of said entrymen, or their assigns, pursuant to the provisions of the statutes of the State of Arizona in such cases made and provided. That plaintiff claims that the taxes complained of are assessed against, levied upon and constitute a lien upon the homestead lands described in plaintiff's complaint.

Value of Lands

10. That the premises of the plaintiff are of the value of more than Ten Thousand Dollars ($10,000.00) and that the total value of the forty-nine (49) tracts of land described and referred to in the plaintiff's bill of complaint, is in excess of Four Hundred Eighty-eight Thousand Dollars ($488,000.00); that the total amount of taxes so assessed and levied as aforesaid, which are claimed by defendants to be a lien upon the equity and interests of the plaintiff in his premises described in his bill of complaint, is the sum of Three Thousand Two Hundred Twenty-eight and 30-100 Dollars ($3,228.30); it being understood, however, that a large portion of said taxes were levied upon the entire one hundred sixty acre units of the plaintiff and others similarly situated before they had assigned portions thereof, as set forth in Exhibit "C" attached to his bill of complaint; that the total taxes assessed against said equities and interests of the persons assessed in the forty-nine (49) tracts of land described in the plaintiff's bill of complaint, is in excess of Twenty-four Thousand Eight Hundred Eleven and 18-100 Dollars ($24,811.18), exclusive of interests and costs.

No Delay in Making Final Proof

20. That neither the plaintiff nor any of the persons similarly situated seek to avoid the payment of any construction, betterment or maintenance costs chargeable against any of the lands described in plaintiff's bill of complaint under the United States Reclamation Law; nor do they claim they are seeking to avoid any tax duly assessed or levied against said lands by the authorized tax authorities of the State of Arizona, after the fixing of the final unit by the Secretary of the Interior and a reasonable opportunity thereafter afforded to make final proof under the United States Reclamation Homestead Law; it is, however, urged

tion, improvement and the raising of necessary and required crops upon their respective homesteads. Plaintiff and those similarly situated claim that neither the plaintiff nor any persons similarly situated are seeking to avoid taxation by delay in making of final proof. That no complaint is made as to excessiveness of the taxes involved. That at all times when the taxes complained of were assessed the valuation placed for purpose of taxation upon the reclamation homestead lands assessed were in each instance an amount not to exceed the then cash value of the rights of the holder of said lands, which rights might be assigned pursuant to the provisions of the Reclamation Act and the rules and regulations embodied in the General Reclamation Circular; that during the years for which the taxes complained of were assessed it has been a common practice among homestead entrymen to assign for the full value of their rights thereto the whole or parts of their said reclamation homestead lands pursuant to the provisions of law and the Rules and Regulations of the Department of the Interior; that as to the land described in Plaintiff's Exhibit "C," attached to his bill of complaint, approximately but not less than one half of each tract thereof as it was assessed before being taxed by the county authorities, had been cleared of brush, trees and other encumbrances, provided with sufficient laterals, except for changes incidental to reduction to farm units, for its effective irrigation, graded and otherwise put in proper condition for irrigation and crop growth, planted, cultivated and irrigated under the Salt River Reclamation Project, and had had average crops grown thereon. That in the majority of instances previous to the year 1910, the assessments were against eighty acres and one hundred sixty acre tracts of lands and said lands were then farmed in units of the area of the original entries.

Exhibits Admitted

21. That the papers and documents referred to in this statement of facts, to wit: "Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries," "General Reclamation Circular," Specimen of "Notice of Acceptance of Proof of Residence, Cultivation and Improvements under General Homestead Laws," "Final Certificate," "Exhibit 'C,'" attached to the plaintiff's bill of complaint, "Complaint in the case of the State of Arizona, Plaintiff, vs. Walter H. Harris and Paul Baxter Beville," were regularly offered in evidence by the plaintiff herein and received with like force and effect as if fully set forth in this agreed statement of facts; and also that the above mentioned "Back Tax Bills" were regularly introduced in evidence by the defendants, and may be considered the same as if they were fully set forth herein.

TRIAL.

The case being submitted on pleading and the agreed statement of facts, plaintiff's bill of complaint was dismissed upon the merits.

DECREE

On March 13, 1920, a decree of dismissal was made and entered. (Printed Record p. 40).

"This cause came on to be heard at the special February, 1920, term of this court and was argued by counsel and submitted to the court for decision upon the pleadings and the agreed statement of facts filed herein, and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows, viz:

That the plaintiff's bill of complaint herein, be and the same is hereby dismissed upon the merits."

APPEAL AND RECORD

Thereupon, the appellant gave notice of appeal for the reason set forth in his specification of errors filed

with his notice, and the same was allowed. (Printed Record p. 47.) Appeal Bond being fixed by the trial judge, the same was duly filed and approved. (Printed Record pp. 56, 57.) Citation was thereupon issued and served. (Printed Record pp. 63, 58.) Enlargement of time to August 18, 1920, for the filing of the record and docketing the case having been ordered, the case was thereafter brought to this court and duly filed and docketed July 22, 1920. (Printed Record p. 59.) Thereafter stipulation as to the contents and printing of record having been signed by the respective counsel, transcript of record was printed and filed. (Printed Record p. 60.)

ASSIGNMENT OF ERRORS

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 13th day of March, 1920.

I.

That the United States District Court of the District of Arizona erred in not finding, holding, adjudging and decreeing that United States Homestead lands entered under the United States Ordinary Homestead Law, (Act of May 20, 1862, Ch. 75, 12 Stat. L. 392 and amendments thereof and supplements thereto, sections 2289-2301, inclusive, United States Revised Statutes) and the United States Reclamation Homestead Law, (Act of June 17, 1902, Ch. 1093, Sec. 1, 32, Stat. 388, and amendments thereof and supplements thereto) and involved in this suit, are exempt from taxation by the state and county tax officials of Maricopa County, State of Arizona, under Clauses 1 and 18, Section 8, Article I and Paragraph 2, Article VI, and Clause 2, Section 3, Article IV, of the United States Constitution, prior to compliance with said homestead laws by

the homestead entrymen of said lands as to the payment of fees due the United States Government for said lands, cultivation, irrigation, reclamation and improvement, and the making of final proof therefor.

II.

That the United States District Court for the District of Arizona erred in finding, holding, adjudging and decreeing that the rights of the plaintiff and persons similarly situated in and to their respective homestead lands, described in the plaintiff's bill of complaint and the said lands are, and were assessable or taxable for State or County taxes by the defendant county taxing officials of Maricopa County, State of Arizona, before the fixing of the Farm Unit by the Secretary of the Interior for the Salt River Project, in which said lands lie, and before affording the plaintiff, and persons similarly situated, and opportunity or reasonable time after the fixing of said Farm Unit to comply with, and before compliance, by plaintiff and persons similarly situated, with the requirements of the United States Ordinary Homestead Law, (Act of May 20, 1862, ch. 75, 12 Stat. L. 392, and amendments thereof and supplements thereto, Sections 2289-2301 inclusive, U. S. Rev. Stat.) or with the requirements of the United States Reclamation Homestead Law, (Act of June 17, 1902, Ch. 1093, Sec. 1-32 Stat. 388, and amendments thereof and supplements thereto) as to payment of fees due the United States Government for said lands, reclamation, irrigation, cultivation or improvement thereof, and while the title to said lands was vested in and while such lands belonged to the United States Government; and in finding, holding and adjudging and decreeing that said acts of said defendant county officials, and the said assessing and taxing of the rights of said plaintiff and persons similarly situated, and the said assessing and taxing of said homestead lands of plaintiff and those similarly situated, and the said assessing and

taxing of said homestead lands of plaintiff and those similarly situated, were not in derrogation of the sovereign exemption of the United States government property from taxation, or contrary to, or in contravention of Clauses 1 and 18, Section 8, Article 1, and Par. 2, Article VI and Clause 2, Section 3, Article IV, of the United States Constitution.

III.

That the United States District Court of the District of Arizona erred in finding, holding, adjudging and decreeing that Chapters III, IV, V, VI and VII, Title 40, Revised Statutes of Arizona, 1913, and amendments and supplements thereto, as applied, administered and justified by said defendant taxing officials of Maricopa County, State of Arizona, in the taxation of United States Homestead lands before compliance with the United States Ordinary Homestead law, (Act of May 20, 1862, Ch. 75, 12 Stat. L. 392, and amendments thereof and supplements thereto, Sections 2280-2301, inclusive, United States Revised Statutes) and before compliance with the United States Reclamation Homestead Law, (Act of June 17, 1902, Ch. 1093, Sec. 1-32 Stat. 388, and amendments thereof and supplements thereto) as to payment of fees due the United States Government for said lands, reclamation, irrigation, cultivation and improvement thereof by this plaintiff, and person similarly situated, are not in conflict with Clauses 1 and 18, Section 8, Article 1, and Par. 2, Article VI, and Clause 2, Section 2, Article IV, of the United States Constitution.

IV.

That the United States District Court for the District of Arizona erred in finding, holding, adjudging and decreeing that the defendants could by ex parte resolution, or otherwise, alter or change retroactively for a period of ten years, and ante-dating the incep-

tion of their official incumbency, the assessment or tax records of Maricopa County, State of Arizona, made by themselves or their predecessors in office, after the institution of this suit, and the service of process upon the defendants and after the transfers of said lands to bona fide claimants under the said county records as originally made, and after the institution of suits in the Superior Court of the State of Arizona for the collection of said taxes theretofore assessed and levied upon United States Homestead lands and upon said records as originally made and kept; and in finding, holding, adjudging and decreeing that said alterations and changes constitute due process of law, and that said acts of said defendants in so altering and changing said records are not and were not in derogation of, and in denial of the rights, privileges and immunities of the plaintiff and persons similarly situated as citizens of the United States or contrary to, or in contravention of, Section 1 of the 14th amendment to the Constitution of the United States.

V.

That the United States District Court for the District of Arizona erred in finding, holding, adjudging and decreeing that the rights of this plaintiff, and persons similarly situated in or to their respective United States Homestead lands, or that said lands are assessable or taxable by the county officials of Maricopa County, State of Arizona under Chapters III, IV, V, VI and VII, Title 40, Revised Statutes of Arizona, 1913, and amendments thereof and supplements thereto, previous to and before compliance with the requirements of the United States Ordinary Homestead Law (Act of May 20, 1862, Ch. 75, 12 Stat. L. 392, and amendments thereof and supplements thereto, Sections 2289-2301, inclusive, United States Revised Statutes), and the Reclamation Homestead Law, (Act

of June 17, 1902, Ch. 1093, Sec. 1 32 Stat. 388, and amendments thereof and supplements thereto), as to payment of fees due the United States Government for said lands, reclamation, irrigation, cultivation or improvement thereof, and while the title to said lands was vested in, and while such lands belonged to the United States Government, and that said assessments and taxation are not in derogation of the sovereign exemption of the United States Government property from taxation or contrary to, or in contravention of Clauses 1 and 18, Section 8, Article 1, and Paragraph 2, Article VI, and Clause 2, Section 3, Article IV of the United States Constitution.

VI.

That the United States District Court of the District of Arizona erred in holding, finding, adjudging and decreeing that the defendants by ex parte resolution of the Board of Supervisors of Maricopa County, State of Arizona, adopted after the expiration of the time for levying taxes under the statutes of the State of Arizona could assess or levy taxes against the rights of the plaintiff, and person similarly situated, to homestead law (Act of May 20, 1862, Ch. 75, 12 Stat. L. 392, and amendments thereof and supplements thereto, Sections 2289-2301 inclusive U. S. Rev. Stat.) and the Reclamation Homestead Law (Act of June 17, 1902, Ch. 1093, Sec. 1, 32 Stat. 388, and amendments thereof and supplements thereto,) previous to compliance with the said United States Homestead Laws as to cultivation, irrigation, reclamation, improvement, or the payment of fees; and that said assessment and levy of taxes as aforesaid constitute due process of law and are not in derogation of or in denial of the rights, privileges, and immunities of the plaintiff, and persons similarly situated, as citizens of the United States or contrary to or in contravention of Section 1, of the 14th Amendment of the United States Constitution.

VII.

That the United States District Court for the District of Arizona erred in denying the plaintiff's motion to strike out the designated portion of defendants answer, because said portions of said answer are irrelevant, incompetent and immaterial, and fail to state sufficient facts to disentitle the plaintiff to the relief prayed for the reasons:

First. Said portions of said answer consist of allegations and assertions by said defendants of their right as taxing officials of Maricopa County, State of Arizona, to assess taxes upon, levy taxes upon, create a tax lien thereon, and to sell for the satisfaction of said tax lien, under Chapters III, IV, V, VI, and VII, Title 49, Revised Statutes of Arizona, 1913, and amendments thereof and supplements thereto United States Homestead lands before compliance with the United States Ordinary Homestead Law (Act of May 20, 1862, Ch. 75, 12 Stat. L. 392, and amendments thereof and supplements thereto, Sections 2289-2301, inclusive, United States Revised Statutes) and the Reclamation Homestead Law (Act of June 17, 1902, Ch. 1093, Sec. 1, 32 Stat. 388, and amendments thereof and supplements thereto,) as to the payment of fees due to the United States Government, reclamation, irrigation, cultivation and improvement thereof, by the entrymen of said lands; and while the title to said lands was and is vested in, and while such lands belonged to the United States Government in derogation of the sovereign exemption of United States Government property and contrary to and in contravention of Clauses 1 and 18, Section 8, Article I, and Paragraph 2, Article VI of the United States Constitution.

Second. Said portions of said answer of the defendants are allegations and assertions of the right of said defendants as taxing officials of Maricopa County, State of Arizona, to assess taxes upon, levy taxes upon,

create a tax lien thereon, sell for the satisfaction of said tax lien and deliver possession thereof under the Revenue Laws of the State of Arizona, particularly Chapters III, IV, V, VI and VII, Title 40, Revised Statutes of Arizona, 1913, supplements thereto and amendments thereof, United States Homestead lands before compliance with the Ordinary Homestead Law as to payment of fees due the United States Government, irrigation, reclamation, cultivation or improvement by the entrymen thereof, contrary to and in contravention of Clause 2, Section 3, Article IV of the United States Constitution.

Third. That said portions of said answer consist of allegations and assertions by the said defendants of their right and authority under Chapters III, IV, V, VI and VII, Title 40, Revised Statutes of Arizona, 1913, and amendments thereof and supplements thereto, to assess and levy taxes against the rights of the plaintiff and persons similarly situated in their respective United States Homesteads retroactively for a period of ten years by an ex parte resolution, to create liens thereon, to sell for the satisfaction of said tax liens and deliver possession of said homesteads after the time for the assessment of taxes had expired under said Statutes of the State of Arizona without due process of law, and in derogation of and in denial of the rights, privileges and immunities of the plaintiff and persons similarly situated, as citizens of the United States contrary to, and in contraventions of Section 1 of the 14th amendment to the United States Constitution.

Fourth. That said portions of said answer consist of allegations and assertions by the said defendants of their right to tax the homestead rights of this plaintiff and other persons similarly situated under Chapters III, IV, V, VI and VII, Title 40, Revised Statutes of Arizona, 1913, and amendments thereof

and supplements thereto, before compliance with the United States Ordinary Homestead Law and the Reclamation Law as to cultivation, irrigation, reclamation, improvement or the payment of fees, and that said statutes as construed, administered and applied by said portions of said defendants answer are contrary to and in conflict with Clauses 1 and 18, Section 8, Article I and Paragraph 2, Article VI, and Clause 2, Section 3, Article IV of the United States Constitution.

Fifth. That said portions of said answer consist of allegations and assertions by the said defendants of their right and authority under Chapters III, IV, V, VI and VII, Title 40, Revised Statutes of Arizona, 1913, and amendments thereof and supplements thereto, to alter and change retroactively for a period of ten years by ex parte resolution, the assessment and tax records of Maricopa County, State of Arizona, as made and kept by themselves and their predecessors in office, after the institution of this suit, and the service of process upon the defendants, and after the transfers of said lands to bona fide claimants under the records as originally made, and after the institution of suits in the Superior Court of the State of Arizona for the collection of said taxes theretofore assessed and levied upon the said United States homestead lands involved herein and upon said records as originally made and kept, without due process of law and in derogation of, and in denial of the rights, privileges and immunities of the plaintiff and persons similarly situated as citizens of the United States contrary to, and in contravention of, Section 1 of the 14th Amendment to the United States Constitution.

Sixth. That said portions of said answer consist of allegations and assertions by said defendant of their intent and design and their alleged right and authority under Chapters III, IV, V, VI and VII, Title 40, Revised Statutes of Arizona, 1913, and amendments

thereof and supplements thereto, to cast a cloud upon the prospective titles of the plaintiff, and persons similarly situated, to United States Homestead lands entered by them, by assessment of taxes upon the levying of taxes and upon the creation of tax liens thereon, and the selling thereof for the satisfaction of said tax liens so created, contrary to and in conflict with Clause 2, Section 3, Article IV of the United States Constitution.

VIII.

That the United States District Court of the District of Arizona erred in denying plaintiff's amended motion to strike out designated portions of the defendants answer for the reasons stated in plaintiff's seventh assignment of errors.

IX.

That the United States District Court for the District of Arizona erred in denying plaintiff's motion for judgment on the pleadings filed in this suit for the reasons:

First. That the answer of said defendants on file herein admits each and every material allegation of fact set forth in plaintiff's Bill of Complaint. That the acts of said defendants complained of, in said bill of complaint, in assessing taxes upon, levying taxes upon, creating tax liens thereon, and selling for the satisfaction of said tax liens under Chapters III, IV, V, VI, and VII, Title 49, Revised Statutes of Arizona, 1913, and amendments thereof and supplements thereto, United States homestead lands before compliance with the United States Ordinary Homestead Law, (Act of May 20, 1862, Ch. 75, 12 Stat. L. 392 and amendments thereof and supplements thereto, Sections 2289-2301, inclusive, United States Revised Statutes), and the Reclamtaion Homestead Law, (Act of June 17, 1902, Ch. 1093, Sec. 1, 32 Stat. 388, and amendments there-

of and supplements thereto as to payment of fees due to the United States Government, reclamation, irrigation, cultivation and improvement thereof by this plaintiff and persons similarly situated; while the title to said lands was and is vested in, and while such lands belonged to the United States Government, is in derogation of the sovereign exemption of the United States Government property from taxation contrary to and in contravention of Clauses 1 and 18, Sec. 8, Article I, Paragraph 2, Article VI, and an interference with the primary disposal of the public domain contrary to and in contravention of Clause 2, Section 3, Article IV of the United States Constitution.

Second. That the answer of said defendants on file herein admits each and every material allegation of fact set forth in the plaintiff's bill of complaint, and that the Chapters III, IV, V, VI and VII, Title 40, Revised Statutes of Arizona, 1913, and amendments thereof and supplements thereto, pleaded, set forth, and relied upon by the said defendants, and as said Revenue Laws of the State of Arizona, are applied, interpreted and administered by said defendants in assessing taxes upon, levying taxes upon, creating tax liens thereon, and selling for the satisfaction of said tax liens United States Homestead lands before the compliance with the United States Ordinary Homestead Law, and the Reclamation Homestead Law, as to payment of fees due to the United States Government, reclamation, irrigation, cultivation and improvement thereof by this plaintiff and persons similarly situated, are in conflict with, and in contravention of Clauses 1 and 18, Sec. 8, Article I, and paragraphs 2, Article VI, and Clause 2, Sec. 3, Article IV of the United States Constitution.

X.

That the United States District Court for the District of Arizona erred in rendering judgment for the

defendants and against the plaintiff, and in dismissing plaintiff's bill of complaint for the reasons:

First: That the pleadings and evidence in this suit admit and show that the taxes complained of were assessed against the lands of this plaintiff, and persons similarly situated, as said lands are described in the plaintiff's bill of complaint before the fixing of the Farm Unit for the Salt River Project, in which said lands lie, and before affording the plaintiff and persons similarly situated, an opportunity or reasonable time to comply with the requirements of the United States Ordinary Homestead Law, (Act of May 20, 1862, Ch. 75, 12 Stat. L. 392, and amendments thereof and supplements thereto, Sections 2289-2301, inclusive, United States Revised Statutes), and the Reclamation Homestead Law, (Act of June 17, 1902, Ch. 1093, Sec. 1, Stat. 388, and amendments thereof and supplements thereto) as to payment of fees due the United States Government for said lands, reclamation, irrigation, cultivation or improvement thereof and while the title to said lands was vested in, and while such lands belonged to the United States Government, in derogation of the sovereign exemption of the United States Government property from taxation, contrary to, and in contravention of, Clauses 1 and 18, Section 8, Article 18, Article I, and paragraph 2, Article VI, and Clause 2, Section 3, Article IV, of the United States Constitution.

Second. That the pleadings and evidence in this suit admit, establish and show that the taxes complained of were assessed against the lands of this plaintiff, and persons similarly situated, as said lands are described in the plaintiff's bill of complaint before the fixing of the Farm Unit for the Salt River Project, in which said lands lie, and before affording the plaintiff and persons similarly situated, an opportunity or reasonable time to comply with the requirements of the

United States Ordinary Homestead Law, and the Reclamation Homestead Law, as to payment of fees due the United States Government for said land, reclamation, irrigation, cultivation or improvement thereof without due process of law, and in derogation of, and in denial of the rights, privileges and immunities of the plaintiff, and persons similarly situated, as citizens of the United States contrary to, and in contravention of Section 1, of the 14th amendment to the United States Constitution.

Wherefore, by reason of the manifest errors aforesaid the said William Irwin prays that the said decree of the said District Court may be in all things annulled, reversed and held for naught, and that this Court do render its decree in favor of the said William Irwin granting him the relief prayed in his said bill of complaint, or that it do remand this cause to the said District Court with directions to render such decree.

FINAL ISSUES.

The foregoing errors may be grouped for the purpose of simplifying the argument into four fundamental questions which therefore become the Main Issues in the case:

ERRORS I, II, VIII, and X, involving 1 and 18, Section 8, Article I, and Paragraph 2, Article VI, and Clause 2, Section 3, Article IV, U. S. Constitution, and Section 1 of the 14th Amendment thereof, become:

ISSUE 1.

Can County taxing authorities of the State of Arizona assess and levy taxes upon, and enforce collection of such taxes against Homestead Land entered under the United States Homestead Laws, (Acts of May 20, 1862, Ch. 75, 12 Stat. L. 392; June 17th, 1902, Ch. 1093, Sec. 1-32, Stat. 388, and amendments thereof and supplements thereto) by sale or other means, be

fore the establishment of the farm unit for the reclamation project, within which such homesteads lie, and before compliance by such Homestead Entrymen with the requirements of the United States Government as to payment of fees due the federal Government as to lands, or reclamation, irrigation, cultivation, or improvement thereof, and before the making of the final proof or the issuance of final certificates to said entryman?

ERRORS VII and IX involving Clauses 1 and 18, Section 8, Article I, and Paragraph 2, Article VI, and Clause 2, Section 3, Article IV, U. S. Constitution, presents:

ISSUE II.

Can County taxing authorities of the State of Arizona indirectly tax homestead lands entered under the United States Homestead Law, previous to the fixing of the farm unit for the reclamation project within which such entries lie ,and before compliance by said homestead entrymen with the requirements of the United States Homestead Law as to the payment of fees due the United States Government for said lands, reclamation, irrigation, cultivation or improvement thereof, by attributing to said entrymen an "equity" in such homestead lands and thereupon taxing said equity, selling said homestead lands and delivering possession thereof to purchasers at tax sales?

ERRORS III, V, and VI, involving Clauses 1 and 18, Section 8, Article I, and Paragraph 2, Article VI, and Clause 2, Section 3, Article IV, U. S. Constitution, and Section 1 of the 14th Amendment thereof, rest upon:

ISSUE III.

Can the County taxing authorities of the State of Arizona retroactively for a period of years antedating their official incumbency, by ex parte resolution, levy

taxes against homestead lands entered under the United States Homestead law before the establishment of the farm unit for the reclamation project within which such lands lie, and before compliance by such homestead entryman with the requirements of the United States Government for the obtaining of title to such lands as to payment of fees due the Federal Government for such lands and the reclamation, irrigation, cultivation and improvement thereof and before the making of the final proof or the issuance of final certificates for said lands."

ERROR IV involving Section 1 of the 14th Amendment to the Constitution of the United States becomes:

ISSUE IV.

Can County taxing authorities of the State of Arizona by an ex parte resolution after the institution of a suit to restrain the collection of taxes on Homestead Entries under the U. S. Homestead Laws, and after the service of process upon such County authorities and the making of previous transfers of such Homestead land to bona fide assignees under such County tax records as originally made, without notice to, or a hearing of the taxpayers concerned, alter or change, retrocatively for a period of years antedating the inception of their official incumbency, the assessment or Tax Records of such County, which records as originally made disclosed that such homestead lands had been assessed and taxed precisely as any other lands in private ownership previous to and prior to compliance with the United States Homestead Laws by the entrymen thereof as to payment of fees due the government on the making of final proof and before the issuance of final certificates therefor, by assessing an alleged "equity" of Entrymen in the Lands involved?

POINTS AND AUTHORITIES

ISSUE 1.

Can County taxing authorities of the State of Arizona assess and levy taxes upon, and enforce collection of such taxes against lands entered under U. S. Homestead Laws. (Acts of May 20, 1862, Ch. 75, 12 Stat. L. 392; June 17, 1902, Ch. 1093, Sec. 1-32 Stat. 388, and amendments thereof and supplements thereto) by sale or other means, before the establishment of the farm unit for the reclamation project, within which such homesteads lie, and before compliance by such Homestead Entrymen with the requirements of the United States Government, as to payment of fees due the federal govrnment for such lands, or reclamation, irrigation, cultivation, or improvement thereof, and before the making of final proof or the issuance of final certificate to said entrymen?

POINT 1.

By the provisions of the second section of the Enabling Act, admitting Arizona into the Federal Union, Article IX of the State Constitution; and Section 1, paragraph 4846 of the Revised Statutes of the State of Arizona, all lands belonging to the United States and all buildings an dimprovements belonging to the United States, are exempt from taxation by the taxing authorities of that state.

Sec. 20, Act of Congress, June 20th, 1910, Ch. 310, 36 Stat. L. 568, 560.

Sec. 2, Art. IX, Constitution of Arizona, Rev. Stat. Ariz., 1913, p. 150.

Par. 4846, Rev. Stat. Ariz., 1913, p. 1563.

Van Brocklin vs. Anderson, 117 U. S., 151, 29 L. Ed. 845:

Wisconsin Central Railroad Company vs. Price County, 133 U. S., 496, L. Ed. 687;

People ex rel McCrea vs. U. S., 93 Ill., 39, 34 Am. Dec. 155.

POINT 2.

Title to public lands being originally in the Federal Government, it is the exclusive prerogative of that government to prescribe the conditions under which title will pass to applicants therefor.

Gibson vs. Cheauteau, 13 Wall. 92, 20 L. Ed. 534;

Wilcox vs. Jackson et dem McConnel, 13 Peters 498, 10 L. 264;

Henshaw vs. Vissell, 18 Wall. 255, 21 L. Ed. 835;

Redfield vs. Parks, 132 U. S. 239, 33 L. Ed. 327;

Dobbins vs. Comm. of Erie County, 16 Peters 435, 10 L. Ed. 1022;

Bagnell vs. Broderick, 13 Peters 436, 10 L. Ed. 235;

Seymore vs. Sanders, 3 Dil. 437, 21 Fed. Cases 12, 690.

POINT 3.

Title to homestead lands as well as to all other public land remains in the Federal Government until complete and exact compliance with the laws prescribed by Congress for its acquirement and disposition, and requires the doing of every requisite act and thing by the Grantee including the payment of land office fees and the acceptance of such acts, things, and fees by the proper land office officials and the issuance of the final certificate by the proper officers before title of any nature passes from the Federal Government to the Grantee.

Kansas Pacific Ry. Co. vs. Prescott, 16 Wall. 603, 21 L. Ed. 373;

Union Pacific Ry. Co. vs. Rockne, 115 U. S. 600, 29 L. Ed. 477; 83 U. S. 535;

Wisconsin Central Ry. Co. vs. Price, 133 U. S. 496, 33 L. Ed. 687;

Hutchings vs. Lowe, 15 Wall. 77, 21 L. Ed. 82;

Central Colorado Improvement Co. vs. Board of County Commissioners, 92 U. S. 264, 21 L. Ed. 495;

Litchfield vs. County of Webster, 101 U. S. 733, 25 L. Ed. 925;

Shiver vs. U. S., 159 U. S. 493, 40 L. Ed. 231;

Hussman vs. Durham, 165 U. S. 145, 41 L. Ed. 664;

Sargent & Lahr, etc. vs. Herrick & Stevens, etc., 221 U. S. 406, 55 L. Ed. 787.

31 Fed. 667;
62 Ala. 421;
69 Cal. 188;
13 Cal. 394;
10 Wash. 246-621;
64 Wis. 603;

Rector vs. Ashley, 6 Wall. 152, 18 L. Ed. 733;

Gobbins vs. Comm. of Erie County, 16 Peters 435, 10 L. Ed. 1022;

U. S. vs. Rickert, 188 U. S. 432, 47 L. Ed. 532;

U. S. vs. Gatoit, 14 Peters 526, 10 L. Ed. 573;

State vs. Bachlder, 5 Minn. 223, 8 Am. Dec. 410;

Railroad Company vs. Prescott, 16 Wall. 603, 21 L. Ed. 373;

Railroad Company vs. McShane, 22 Wall. 444, 22 L. Ed. 747;

Fuller vs. Hunt, 58 Iowa 163;

Dickerson vs. Bridges, 147 Mo. 235;

Earnest Smart vs. Kennedy, 123 Ala. 627;

Stearns vs. Minnesota, el rel Mar, 179 U. S. 222, 45 L. Ed. 162;

Hutchin svs. Low, 82 U. S. 69, 21 L. Ed. 82;

Fisbie vs. Whitney, 9 Wall. 187, 19 L. Ed. 668.

POINT 4.

Where, as in this case, Homestead Entrymen under United States Homestead Laws, have not complied with the conditions of such laws by the payment of fees due the Federal Government for such lands, nor as to cultivation, improvement or irrigation of such entries, the title has not passed from the Federal Government and such lands are not taxable by state authorities.

Circular No. 541, Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries Approved April 6, 1917.

General Reclamation Circular, Laws and Regulations relating to The Reclamation of Arid Lands by the United States. Approved May 18, 1916.

Stearns vs. Minn: 45 L. Ed. 177;

N. R. R. R. Co. vs. Rockne, 115 U. S. 600, 29 L. Ed. 477;

Hussman vs. Durham, 165 U. S. 143, 41 L. Ed. 664;

Shiver vs. U. S., 159 U. S. 492, 40 L. Ed. 231;

Diver vs. Friedheim, 43 Ark. 203;

U. P. R. R. Co. vs. McShane, 22 Wall. 444, 22 L. Ed. 747; 7 N. W. 468;

Hutchings vs. Lowell, 15 Wall. 77, L. Ed. 82;

Pitts vs. Clay, 27 Fed. 635;

Clear Water Timber Co. vs. Sho Shone County, 155 Fed. 612;

U. S. vs. City of Milwaukee, 100 Fed. 629;

Kansas Pac. R. R. Co. vs. Prescott, 16 Wall. 603, 21 L. Ed. 373;

ISSUE II.

Can County taxing authorities of the State of Arizona, indirectly tax homestead lands entered under the United States Homestead Law, previous to the fixing of the farm unit for the reclamation project within which such entries lie, and before the compliance by said Homestead Entrymen with the requirements of the United States Homestead Law as to the payment of fees due the United States Government for said lands, reclamation, irrigation, cultivation or improvements thereof, by attributing to said entrymen an "equity" in such homestead lands and thereupon taxing said "equity," selling said homestead lands, and delivering possession thereof to purchasers at tax sales?

POINT 1.

Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the rights, privileges and immunities of the claimants respecting public lands are to be measured by the acts of congress, departmental administration and regulations, and judgment and decisions of Federal Courts; and it is not for the states to declare what the policy of the Federal Government, with respect to public lands, shall be.

Gibson vs. Chouteau, 13 Wall. 92, 20 L. Ed. 534;

Bagnell vs. Brodrick, 13 Peters 436, 10 L. Ed. 235;
McCune vs. Essig, 199 U. S. 382, 50 L. Ed. 237;
U. S. vs. Turner, 54 Fed. 228;
Bernier vs. Bernier, 147 U. S. 242, 37 L. Ed. 152, 13 Su. Ct. Rep. 244;
Hutchison Invest. Co. vs. Caldwell, 152 U. S. 65, 38 L. Ed. 350, 14 Su. Ct. Rep. 504;
Hoadley vs. San Francisco, 94 U. S. 4, 24, L. Ed. 34;
Rector vs. Ashley, 6 Wall. 142, 18 L. Ed. 733;
Gobbins vs. Comm. of Erie County, 16 Peters 435, 10 L. Ed. 1022;
U. S. vs. Rickert, 188 U. S. 432, 47 L. Ed. 532;
U. S. vs. Gatoit, 14 Peters 526, 10 L. Ed. 573;
State vs. Bachelder, 5 Minn. 223, 8 Am. Dec. 410.

POINT 2.

There is no analogy between a "homesteaders right" and an "equity," nor between the "right" of a homesteader and an "equitable interest."

Tewksbury vs. Readington, 8 N. J. Law (3 Halst.) 319;
Avery's Lessees vs. Dufrees, 9 Ohio (9 Ham.) 145;
Thygerson vs. Whitback, 5 Utah 506, 16 Pac. 493;
Brown vs. Freed, 43 Ind. 253, 10 R. I. 387, 35 Atl. 213;
Rector vs. Ashley, 18 L. Ed. 735;
Chotard et al vs. Pope, 6 L. Ed. 737, 30 Land Dec. 206;
Hussman vs. Durham, 165 U. S. 145, 41 L. Ed. 664;
Shiver vs. U. S., 159 U. S. 493, 40 L. Ed. 231;

Witherspoon vs. Duncan, 4 Wall. 210, 18 L. Ed. 339:
147 Mo. 238:
123 Ala. 627:
58 Iowa 163:
Kansas Pac. R. R. Co. vs. Prescott, 16 Wall 603, 21 L. Ed. 373:
U. P. Ry. Co. vs. McShane, 22 Wall. 444, 22 L. Ed. 747:
Fisbie vs. Whitney, 9 Wall. 187, 19 L. Ed. 668:
Bagnell vs. Brodrick, 13 Peters 436, 10 L. Ed. 235:
County of Chase vs. Shipman, 14 Kans. 532, Book 27 Pac. State Reports 405:
Comm. Douglas County vs. U. U., Kansas 616 Book 25, Pac. State Reports 374:
Kansas Lbr. Co. vs. Jones, 32 Kans. 105:
U. S. vs. Rickert, 188 U .S. 432, 47 L. Ed. 532:
Territory of New Mexico ovs. U. S. Trust Co., 172 U. S. 171, 43 L. Ed. 407:
People ex rel McCrea vs. U. S., 93 Ill. 30, 34 Am. Rep. 155.
37 Land Decision 718.
40 Land Decisions 93, 267.

POINT 3.

The substance and effect only, and not the form of an act, is to be regarded, and where, as in the case of Arizona Statutes and the taxes assessed are made, a lien upon the property; provide that an action for the collection of taxes is in the nature of an an action in rem; providing for a sale of the property assessed to satisfy the tax lien and for the delivery of possession of such property to the purchaser thereof, such assessment and tax levy and the procedure outlined constitute taxation o fthe land involved, regardless of the guise adopted to conceal the tax levy.

Pars. 4845, 4910, 4920, 4991, Rev. Stat. Ariz. 1913;
Barnes Fed Code, p. 906, par. 3969-4023, Act of Congress, May 10, 1872, c 152, Sec. 1, 17 Stat. 91. Pars. 3974 3976, 3979.
Act of Congress Feb. 27, 1865, c. 64, 13 Stat. L. 441, Sec. 910 Rev. Stat. U. S., p. 35, Vol. 5, Fed. Stat. Ann.
Duggin vs. Davey, 14 Dak. 110;
Belg vs. Meagher, 104 U. S. 283, 26 L. Ed. 736;
Davidson vs. Calkins, 92 Fed. 230;
24 Ore. 265;
St. Louis Mining Co. vs. Montana Milling Co. 171 U. S. 650, 43 L. Ed. 320;
Garcey vs. Con. Mining Co. 94 U. S. 762, 24 L. Ed. 313;
Van Allen vs. Assessors, 3 Wall. 513, 18 L. Ed 222;
Shaffer vs. Carter, 40 S. Ct. 221;
Galveston, H. & S. R. Co. vs. Texas, 210 U. S. 234, 52 L. Ed. 1031.

POINT 4.

The right of possession accorded to a homestead entryman is measured and determined solely by the Federal law previous to the issuance of final receipt, and nt by state legislation.

Balsz vs. Liechenaw, 4 Ariz. 227;
Zimmerman vs. McCurdie, 15 N. D. 79, 12 Ann. C. 29;
Warkros vs. Cowan, 13 Ariz. 42;
Spoat vs. Durland, 2 Okla. 24;
Gibson vs. Chouteau, 20 L. Ed. 534;
McCune vs. Essig, 199 U. S. 382, 50 L. Ed. 337;
Bagnell et al vs. Broderick, 13 Peters 436, 10 L. Ed. 435;

Rector vs. Ashley, 6 Wall. 142, 18 L. Ed. 733;
Dobbins vs. Comm. Erie County, 16 Peters 435, 10 L. Ed. 1022;
U. S. vs. Rickert, 188 U. S. 432, 47 L. Ed. 534;
U. S. vs. Gratoit, 14 Peters 526, 10 L. Ed. 573;
State vs. Bachelder, 5 Minn. 223, 80 Am. Dec. 410; 2 Minn. 153.

POINT 5.

The assessing of taxes, by state authorities upon Government homestead lands entered under the provisions of the United States Homestead Laws, which become a lien against the lands for the satisfaction thereof, and the sale and delivery of such lands for the satisfaction of the taxes thereby imposed and existing as a lien against the lands, constitute an interference with the operation and enforcement of the United States Public land laws

Calif. vs. Cent. Pac. Ry. Co. 127 U. S. 27, 32 L. Ed. 150;
Indian Territory Illuminating Oil Co. vs. State of Cal., 240 U. S. 523, 60 L. Ed. 779;
Chocataw O. & G. R. Co. vs. Harrison, 235 U. S. 29, 659 L. Ed. 234;
Dobbins vs. Comm. etc. 16 Peters 435, 10 L. Ed. 1022;
Com. vs. Phila. Co., 157 Pa. 537;
Com. vs. Edison Elec. Light Co. Id. 529;
In re Sheffield, 64 Federal 835;
Hollida vs. Hunt, 70 Ill. 712, 22 Am. Rep. 65;
Telegraph Co. vs. Texas (105 U. S. 466, 25 L. Ed. 2068);
Searight vs. Stokes (3 How. 178, 11 L. Ed. 550);
People ex rel vs. Assessors, 156 N. Y. 419, 61 N. E. 270;
U. S. vs. Texas, 143 U. S. 646, 36 L. Ed. 293;

Hiawatha Blatchford pr. 12 F. C. 6171;
Hawkins vs. Filkins, 24 Ark. 300;
McCulloch vs. State of Maryland et al 4 Wheat 316, 4 L. Ed. 579);
Wisconsin Central R. R. Co. et al vs. Price County, 133 U. S. 496, 33 L. Ed. 687).

ISSUE III.

Can the county taxing authorities of the State of Arizona under the laws of that state retroactively for a period of years antedating their official incumbency, by ex parte resolution, levy taxes against homestead lands entered under the United States Homestead Laws before the establishment of the farm unit for the reclamation project within which such lands are located, and before compliance by such homestead entrymen with the requirements of the United States Government for the obtaining of title to said lands as to payment of fees due the Federal Government for such lands and the reclamation, irrigation, cultivation and improvement thereof and before the making of the final proof or the issuance of final certificates for said lands?

POINT 1.

No provision exists in the statutes of Arizona for the taxing of any right or privilege of homesteaders in or to homesteads entered under the United States Homestead Laws, apart and separate from the land, before the making of final proof for such entries.

Pars. 5552, 4847, 4830, 4845, 4919, 4920, 4917, 4918, 4946, Rev. Stat. Ariz. 1913;
Sec. 3 Art. IX, Ariz. Const;
City of Newport vs. Keatch, 224 S. W. 884;
City Council vs. St. Phillips Church, 1 McMul. Eq. 130;
Martin vs. Charleston, 13 Rich Eq. 50;
Levy vs. Smith, 4 Fla. 154;

Brewer County vs. Brewer, 69 Maine 62;
Butlers App., 73 Pa. St. 448;
State vs. County Court, 19 Ark. 30;
State vs. Alston, 94 Tenn. 673;
Bartholemew vs. Austin, 87 Fed. 370;
State vs. Chamberlin, 37 N. J. L. 388;
Neary vs. Phila R. Co. 7 Penn. (Del.) 414, 9 Atl. 405;
Webster vs. People, 98 Ill. 343;
Virginia etc. R. R. Co. vs. Wash. County, 30 Gratt, Va. 471;
Van Brocklin vs. Tenn., 117 U. S. 151;
Act 47 Sess. L. 1803, p. 37;
Raisor vs. Chicago, 215 Ill. 47, 74 N. E. 69;
McFadden vs. Blocker, 3 Ind. Terr. 224, 54 S. W. 873.

POINT 2.

The homesteaders' right to possession of their respective homesteads being, by the taxing authorities, denominated an "equity" in such homesteads and classified as intangible property, as such, does not admit of any rational or uniform admeasurement of value so as to make possible a just apportionment of the tax which is a constitutional requisite of all ad valorem taxation such as the authorities levied upon the alleged property in question.

Pars. 4840, 4868, 4869, 4870, 4871, Chapter 8, 9, 10, 11, 12, 13, 14 Title 48, Ch. 5, Title 49, Rev. Stat. Ariz. 1913;
Stuart vs. Palmer, 74 N. Y. 183, 30 Am. Rep. 289;
Wells Fargo vs. Crawford County, 63 Ark. 576, 37 L. R. A. 371;
People ex rel & Del. R. R. Co. vs. Clapp et al, 152 N. Y. 490, 39 L. R. A. 237;

Ellis vs. Fraser, Ore., 53 L. R. A. 454;
Kans. City R. R. Co. etc. vs. Road Imp. Dist. etc. 65 L. Ed. 715, 17 Advan. Opinions 715;
Marsh vs Clark County, 42 Wis. 502.

POINT 3.

The assessing of the homesteader's right to possession made by ex parte resolution of the tax authorities of Maricoopa County, Arizona, on January E, VTBJ, *without notice to or hearing of the taxpayers concerned, was in violation of the due process and equal protection clauses of the 14th amendment of the United States Constitution.*

Stuart vs. Palmer, 74 N. Y. 183, 30 Am. Rep. 289;
Davidson vs. Bd. of Admin. of New Orleans, 96 U. S. 97, S. C. 17 Albany Law Journal 223;
Dartmouth College, 4 Wheat 519;
Westervelt vs. Gregg, 12 N. Y. 209;
Par. 4877, 4892, Rev. Stat. Ariz. 1913;
Hagar vs. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663;
Kentucky R .Tax Cases, 115 U. S. 321, 29 L. Ed. 414, 6 Su. Ct. Rep. 57;
Winona & St. P. Land Co. vs. Minnesota, 159 U. S. 526, 537, 40 L. Ed. 247, 251, 16 Sup. Ct. Rep. 83;
Lent vs. Tillson, 140 U. S. 316, 35 L. Ed. 419, 11 Su. Ct. Rep. 825;
Glidden vs. Harrington, 189 U. S. 255, 47 L. Ed. 798, 23 Sup. Ct. Rep. 574;
Hibben vs. Smith, 191 U. S. 310, 48 L. Ed. 195, 24 Sup. Ct. Rep. 88;
Security T. & S. V. Bk. vs. Lexington, 203 U. S. 323, 51 L. Ed. 204, 27 Sup. Ct. Rep. 87;
Central R. Co. vs. Wright, 207 U. S. 127, ante 134, 28 Sup. Ct. Rep. 47.

ISSUE IV.

Can County taxing authorities of the State of Arizona under the laws of that State, by an ex parte resolution, after the institution of a suit to restrain the collection of taxes on Homestead Entries under the U. S. Homestead Law, and after the service of process upon such County authorities and the making of previous transfers of such Homestead land to bona fide assignees under such County tax records as originally made, without notice to or a hearing of the taxpayers concerned, after or change retroactively for a period of years antedating the inception of their official incumbency, the assessment or Tax Records of such County, which records as originally made disclosed that such homestead lands had been assessed and taxed precisely as any other lands in private ownership previous to and prior to compliance with the United States Homestead Laws by the entrymen thereof as to payment of fees due the Federal Government or the making of final proof and before the issuance of final certificate therefor, by asssing an alleged "equity" of entrymen in the lands involved?

POINT 1.

The County assessment or tax rolls of Arizona, are subject only to the correction of manifest clerical errors by the officials responsible for the same, and during their term of office, and cannot be changed upon the recollection of officials, or upon the testimony of third persons, or by persons who were not the incumbents of offices or responsible for the records involved at the time the same were made.

Larson vs. Dickey, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. A. S. R. 505;
Ill. Cent. R. R. Co. vs Ky., 218 U. S. 551, 54 L. Ed. 1147;
Par. 4020, Rev. Stat. Ariz., 1913;

Watt vs Reynolds, 27 Vermont 206;
Hartwell vs. Littleton, 13 Pick 229;
Saco Water Power Co. vs. Buxton, 98 Maine 295, 56 Atla. 914;
Fulton vs. Fuller, 33 Mich. 199;
Joohnson vs. Malloy, 74 Cal. 430, 16 Pac. 228;
Ill. S. R. R. Co. vs. People, 215 Ill. 12, 74 N. E. 97;
Cleveland etc. vs. Ensley, 44 Ind. App. 538, 89 N. E. 667;
Gibbons vs. Adamson, 44 Kans. 203, 24 Pac. 51;
Hadley vs. Chamberlin, 11 Vermont 618;
McGrath vs. Wallace, 110 Cal. 548;
Ferenna vs. Sunnyside Land Co., 124 Cal. 437;
Turner vs. Town of Pewee Valley, 38 S. W. 143.
Hager vs. Hall, 150 N. Y. 552, 54 N. E. 1092.

POINT 2.

The statutes of Arizona relating to the correction of errors "in the back tax book" of the County Revenue records, authorizes only correction of clerical errors appearing on the record, and where the tax records correctly record the acts of County taxing officials of Arizona, such acts cannot be undone by changing the records thereof.

Cowdery vs. London etc. Bank, 130 Cal. 298, 73 Pac. 196;
Davidson vs. Richardson, 50 Ore. 742, 17 L. R. A. (N. S.) 310;
Jacks vs. Adamson, 56 Ohio St. 307, 47 N. E. 48;
Lourance vs. Lankford, 106 Ark. 470, 153 S. W. 502, 22 Eng. Rul. Cas. 824;
Jeudevine vs. Jackson, 18 Vt. 470;
Langon vs. Poor, 20 Vt. 13;
State vs. Phillips, 102 Mo. 664;
Blight 6 T. B. Morn. 192;
Jones vs. Tiffin, 24 Iowa 190.

POINT 3.

Tax records, when completed and authenticated, cannot be changed under circumstances where such change would operate unjustly upon the rights of parties who are justified in relying upon such records as found, and in determining from such records the legality of existing taxes and such parties cannot be prejudiced by the subsequent change of records.

22 Eng. Rul Cas. 824;
Jeudevine vs. Jackson, 18 Vt. 470;
Langon vs. Poor, 20 T. 13;
State vs. Phillips, 102 Mo. 664;
Blight 6 T. B. Morn. 192;
Jones vs. Tiffin, 24 Iowa 190.

ARGUMENT.

ISSUE I.

Can county taxing authorities of the State of Arizona assess and levy taxes upon, and enforce collection of such taxes against Homestead Land entered under the United States Homestead Laws, (Act of May 20, 1862, Ch. 75, 12 Stat. L. 392; June 17, 1902 Ch. 1093, Sec. 1-32 Stat. 388, and amendments thereof and supplements thereto) by sale or other means, before the establishment of the farm unit for the reclamation project, within which such homestead lie, and before compliance by such Homestead Entrymen with the requirements of the United States Government, as to payment of fees due the federal government for such lands, or reclamation, irrigation, cultivation, or improvement thereof, and before the making of final proof or the issuance of final certificate to said entrymen?

Point 1.

By the provisions of the second section of the Enabling Act, admitting Arizona into the Federal Union; Article IX of the State constitution; and Section 1, paragraph 4846 of the Revised Statutes of the State of Arizona, all lands belonging to the United States and all buildings and improvements belonging to the United States, are exempt from taxation by the taxing authorities of that state.

The provisions referred to in the foregoing Point One in so far as they relate to the proposition stated, are as follows:

"That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian Tribe, the right or title to which shall have been acquired through or from the United States or any prior

sovereignty, and that until the title of such Indian or Indian Tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Coongress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said Sttae so long and to such extent as Congress has prescribed or may hereafter prescribe." (Sub. Sec. 20, Act of June 20th, 1910, Ch. 310, 30 Stat. L. 568, 569).

"That there shall be exempted from taxation all Federal, State, County and municipal property. Property of educational, charitable, and religious associations or institutions not used or held for profit may be exempted from taaxtion by law. Public debts, as evidenced by the bonds of Arizona, its counties, municipalities, or other subdivisions, shall also be exempt from taxation. There shall further be exempt from taxation, the property of widows, residents of this state, not exceeding the amount of two thousand dollars, where the total assessment of such widow does not exceed five thousand dollars. All property in the State not exempt under the laws of the United States or under this constitution, or exempted by law under the provisions of this action, shall be subject to

taxation to be ascertained as provided by law. This section shall be self-executing." (Sec. 2, Art. IX, Constitution of Arizona, Rev. Stat. Ariz., 1913, p. 150).

"Nothing in this act shall be construed to require or permit double taxation, and all property of every kind and nature whatsoever, within this State, shall be subject to taxation, except:

(1) All lands and lots of ground, with buildings, improvements, and structures thereon, belonging to the state or any municipal corporation, or to any county of the state, and all lands belonging to the United States, and all buildings and improvements belonging to the United States. * * * (Par. 4846, Rev. Stat. Ariz., 1913, p. 1563).

It was held by the Supreme Court of the United States in Van Brocklin vs. Anderson that the property of the United States is exempt from taxation by the states by the reason of its sovereign exemption, independent of any covenant or agreement of the states forming the Federal Union. If there ever was any doubt about the matter, the exemption is clearly established by the foregoing statutory provisions, and the proposition is too well recognized and understood to need further discussion.

Van Brocklin vs. Anderson, 117 U. S., 151, 29 L. Ed. 845;

Wisconsin Central Railroad Company vs. Price County, 133 U. S., 496, L. Ed. 687;

People ex rel McCrea vs. U. S. A., 93 Ill., 30, 34 Am. Dec. 155.

Point 2.

Title to public lands being originally in the Federal Government, it is the exclusive prerogative of that government to prescribe the conditions under which title will pass to applicant therefor.

It must be conceded that title to the public lands involved herein was originally lodged in the federal government. The embarrassment that would result from permitting the states to interfere with the proprietory rights of the Federal Government are too apparent to require detailed examination. This proposition has been settled by a long line of authorities.

In the case of Gibson vs. Cheautau (13 Wall, 92, 20 L. Ed. 534) the Supreme Court of the United States said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations... That power is subject to no limitaitons. Congress has the absolute right to prescribe the times, the conditinos and the mode of transferring this prpoerty, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution with the further clause that the legislature shall also not interfere with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers."

Whenever the question is whether title to land which has been the property of the United States has passed that question must be resolved by the laws of the United States. In the case of Wilcox vs. Jackson et dem. McConnell, decided by the United States Supreme Court, (13 Peters 498, 10 L. 261), a conflict arose over the question of a title or interest recognized by the State of

Illinois, and the rights of a person holding under the public land laws, and in its decision the Court said:

"A much stronger ground, however, has been taken in argument. It has been said that the State of Illinois has a right to declare by law that a title derived from the United States which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States, and the construction from her own courts seems to give that effect to her statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise or alienation. But the property in question was a part of the public domain of the United States: Congress is vested by the Constitution with the power of dispoosing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued, and therefore by the laws of the United States the legal title has not passed, but remains in the United States. Now, if it were competent for a State Legislature to say that notwithstanding this, the title shall be deemed to have passed; the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regualtions concerning that disposition, but that Illinois poossessed it. That would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only. And the practical result in this very case would be, by force of State legislation to take from the United States their own land, against their own will, and against their own laws. We hold the true principile to be this, that whenever the question in any court, State or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that when-

ever, according to those laws, the title shall have passed, then that property, like all other property in the State is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States. * * *"

The plenary power of Congress over the disposition of the public lands is expressly recognized to exist by the organic law of the states, and Congress may dispose of them at such time and in such manner and for such purposes as in its judgment may deem best.

Henshaw vs. Vissell, 18 Wall 255, 21 L. Ed. 835;

Redfield vs. Parks, 132 U. S. 239, 33 L. Ed. 327;

Dobbins vs. Comm. of Erie County, 16 Peters, 435, 10 L. Ed. 1022 ;

Bagnell vs. Broderick, 13 Peters, 436, 10 L. Ed. 235;

Seymore vs. Sanders, 3 Dil. 437, 21 Fed. Cases 12, 660.

Point 3.

Title to homestead lands as well as to all other public land remains in the Federal Government until complete and exact compliance with the laws prescribed by Congress for its requirements and disposition, and requires the doing of every requisite act and thing by the Grantee including the payment of land office fees and the acceptance of such acts, things, and fees by the proper land office officials and the issuance of the final certificate by the proper officers before title of any nature passes fro mthe Federal Government to the Grantee.

The question of *when titles passes from the Federal Government* to those seeking to acquire a title under the Public Lands Law *is one of the deciding questions* in this case. The Federal courts and the Land Department of the United States Government

have clearly established that the Federal Government alone is the judge of when title to public land has been earned, and that until the performance of every condition required the title, legal and equitable, remains in the National Government. In upholding this proposition there is not the slightest deviation throughout the entire history of our public land policy.

Kansas Pacific Ry. Co. vs. Prescott, 16 Wall 603, 21 L. Ed. 373;

83 U. S. 535;

Union Pacific Ry. Co. vs. Rockne, 115 U. S. 600, 29 L. Ed. 477;

Hutchings vs. Lowe, 15 Wall 77, 21 L. Ed. 82;

Central Colorado Improvement Co. vs. Board of County Commissioners, 92 U. S. 264, 21 L. Ed. 495;

Litchfield vs. County of Webster, 101 U. S. 733, 25 L. Ed. 925;

Wisconsin Central Railroad Company vs. Price County, 133 U. S. 496, 33 L. Ed. 687;

Shiver vs. U. S., 159 U. S. 493, 40 L. Ed. 231;

Hussman vs. Durham, 165 U. S. 145, 41 L. Ed. 664;

Sargent & Lahr, etc. vs. Herrick & Stevens, etc., 221 U. S. 406, 55 Ed. 787.

31 Fed. 667;

62 Ala. 421;

69 Cal. 188;

13 Cal. 394;

10 Wash. 246-621;

64 Wis. 603.

Until the making of final proof regarding a homestead, the title to the land does not pass and until title does pass, the land remains the property of the United States.

Rector vs. Ashley, 6 Wall 152, 18 L. Ed. 733:

Dobbins, vs. Comm. of Erie County, 16 Peters 435, 10 L. Ed. 1022:

U. S. vs. Rickert, 188 U. S. 432, 47 L. Ed. 532:

U. S. vs. Gatoit, 14 Peters 526, 10 L. Ed. 573:

State vs. Bachlder, 5 Minn. 223 8 Am. Dec. 410.

The test of whether title to homestead lands has passed from the federal government is determined not by the privileges accorded to the occupants of such lands, such as the right to mortgage the land, or to relinquish or transfer the same, but upon the question of whether or not all of the acts and things required under the homestead law have been complied with and whether all payments to the government have been made.

There is no characteristic attached to reclamation homestead entries that differenentiate such entries from ordinary homestead lands, in so far as taxation is concerned, except that additional requirements for compliance with the law are imposed upon the entryman. Entryman is denied the right of relinquishment accorded under the ordinary homestead law, and is given in lieu thereof the right of assignment to a person equally qualified, but this in no wise changes his responsibilities, or the nature of the entry.

Upon the facts involved in Railroad Company vs. Prescott, 16 Wall 603, 21 L. Ed. 373), the Railroad Company not only had the power to sell the land, but was required to do so, and still the court held that such land was not taxable. This was also true in the case

of Railroad Company vs. McShane, (22 Wall 444, 22 L. Ed. 747).

The ordinary homesteader had an acknowledged right to mortgage his homestead land, but this did not entitle the state authorities to tax the same.

Fuller vs. Hunt, 58 Iowa 163;

Dickerson vs. Bridges, 147 Mo. 235;

Earnest Smart vs. Kennedy, 123 Ala. 627.

In the case of the Union Pacific Railroad Company vs. McShane, (22 Wall 444, 22 L. Ed. 747) the Railroad Company had a right to mortgage its grant for $10,000,000.00 and to receive and use the money. It exercised exclusive acts of ownership by selecting, classifying, advertising and selling portions of its land. Nevertheless, the land was held not taxable until the doing of all acts required of the Railroad Company. Justice Miller speaking for the Court uses the following language:

"It is not necessary to go into the merely technical question whether the legal title passed from the United States by virtue of that mortgage and the Act of Congress which authorized it, nor whether, if it ever becomes necessary to foreclose that mortgage, the rights of the United States in the land would be devested by the proceeding, because we are satisfied that the United States, until she conveys them by patent or otherwse, has an interest, whether it be legal or equitable, which the State of Nebraska is not at liberty to devest by the exercise of the right of taxation.

Under these views we are of the opinion that the State had no right to tax the lands for which the cost of surveying had not been paid, and for which no patent had been issued; and as the decree of the Circuit Conrt was made in conformity with these principles it is affirmed."

The question of the passing of title is not dependent upon the importance, nature or value of the acts, things or payments required of the homesteader, but upon the sole question of whether *anything* remains to be paid or done by the grantee.

As was said by the United States Supreme Court, (Stearns vs. Minnesota el rel Mar, 179 U. S. 222, 45 L. Ed. 162):

"It is true as has been held in the ordinary administration of the affairs of the land department, that whenever full payment has been made to the United States and the full equitable title has passed to an individual purchaser or homesteader, the mere delay in furnishing to such purchaser or homesteader the legal evidence of his title does not relieve the land from ordinary state taxation. * * * But it has also been held that until the very last moment that liens or equitable rights of the United States are extinguished, no matter how trivial or small may be the right or the lien reserved, the land is not subject to state taxation." * * *

The same court in Hutchins vs. Low, (82 U. S. 66, 21 L. Ed. 82) said:

"The question here presented was before this court, and was carefully considered, in the case of Fisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668. And it was there held under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any right in the land occupied, as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the total, including the payment of the price of the land have been performed by the settler. When these prerequisites have been complied with, the

settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived." * * *)

The foregoing principle applies to Homesteads with the same force and effect as to any other public land.

Point 4.

Where, as in this case, homestead entryman of United States Homestead laws, have not complied with the conditions of such laws by the payment of fees due the Federal Government for such lands nor as to cultivation, improvement or irrigation of such entries, the title has not passed from the Federal Government and such lands are not taxable by State authorities.

The original homestead law (Act of May 20th, 1862, Ch. 75, 12 Stat. L. 392, as amended by Act of March 3rd, 1891, Ch. 561, Sec. 5, 26 Stat. L. 1097, Vol. 6, Fed. Stat. Annotated p. 285) herein referred to and commonly spoken of as the "Ordinary Homestead Law" in so far as material to the questions presented provides as follows:

Sec. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivsions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and ac-

quired, exceed in the aggregate one hundred and sixty acres. (As amended by Act March 3, 1891).

Sec. 2290. That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should insure, in whole or in part, to the benefit of any person except himself or herself, and upon filing such affidavit with the register or receiver, on payment of five dollars, when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified. (As amended by Act March 3, 1891).

* * * * * * * *

Sec. 2294. That hereafter all proofs, affidavits and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, pre-emption,

timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits proofs, and oaths, be made before any United States commissioner or commissioners of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: Provided, That in the case affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs and oaths in the land districts in which the lands applied for are located: but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

"For each affidavit, twenty-five cents.

"For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

"For each deposition of claimant or witness, prepared by the officer, one dollar.

"Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars." (As amended by Act March 4th, 1904, 33 Stat., 53).

Sec. 2296. No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debts contracted prior to the issuing of the patent therefor.

Sec. 2298. No person shall be permitted to acquire title to more than one quarter section under the provisions of this chapter.

Upon the creation of the Interior Department (Act of March 3, 1849, Revised Stat., Sec. 437, 9th Stat. L. 395, Vol. 14, U. S. Stat. Annotated, p. 525, Barnes Federal Code, p. 131). The Secretary of the Interior was charged with the supervision of public business including public lands and mines. (Act of March 3, 1849, Ch. 108, Revised Stat. Sec. 441, Sections 3, 5, and 9, 9th Stat. L. 395, Vol. VI, U. S. Stat. Annotated p. 188, Barnes Fed. Code, p. 133). By virtue of the power vested in him, the Secretary of the Interior through the General Land Office, (Revised Stat. 446, Acts of April 25th, 1912, July 4th, 1836 and March 3rd, 1873, Vol. VI, Federal Statute Annotated, p. 210, Barnes Federal Code, p. 134), from time to time issues rules and regulations governing the different classes of public land and acquiring of title thereto.

The material part of the regulations governing ordinary homesteads approved April 6th, 1917 (Circular No. 541, entitled "Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries.") relating to the questions presented herein, are as follows:

How Claims Under The Homestead Law Originate

3. (a) Claims under the homestead laws may be

initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by the filing of a soldier's or sailor's declaratory statement, or by the presentation of an applictaion to enter any surveyed lands of that kind.

(b) Under the law relating to ordinary lands a homestead entry is limited to 160 acres, but this area may sometimes be slightly exceeded where the tract is made up of irregular subdivisions. However, an entry of land which has been designated under one of the enlarged-homestead acts may contain 320 acres (see par. 43), and an entry of land designated under the stock-raising act may contain 640 acres. In western Nebraska 640 acres may be entered under the Kinkaid Act (explained in a special circular) without any designation of the land.

4. (a) Settlement is initiated through the personal act of the settler placing improvements upon the land or establishing residence thereon; he thus gains the right to make entry for the land as against other persons. A settlement on any part of a surveyed quarter section subject to homestead entry gives the right to enter all of that quarter section, but if a settler desires to initiate a claim to surveyed tracts which form a part of more than one technical quarter he should define his claim by placing some improvements on each of the smallest subdivisions claimed. When settlement is made on surveyed lands the settler must plainly mark the boundaries of all lands claimed. Within a reasonable time after settlement actual residence must be established on the land and continuously maintained. Entry should be made within three months after settlement upon surveyed lands or within that time after the filing in the local land office of the plat of survey of lands unsurveyed when settlement was made. Otherwise, the preference right of entry may be lost. Under the act of August 9, 1912, (37 Stat., 267), settlement right on not exceeding 320 acres of lands designated by the Secretary of the Interior as subject to

entry under the enlarged homestead law may be obtained by plainly marking the exterior boundaries of all lands claimed, whether surveyed or unsurveyed followed by the establishment of residence, except as to lands designated under Section 6 of said Acts where residence is not required, but where the settlement right is required to be initiated by plainly marking the exterior boundaires of the land claimed and the placing and maintenance of valuable improvements thereon. A settlement right on not exceeding 640 acres of unsurveyed land designated as subject to the stock-raising act may be obtanied by establishment and maintenance of residence thereon, provided the boundaries of the tract claimed are plainly marked on the ground.

* * * * * * * * *

By Whom Homestead Entries May Be Made

6. Homestead entries may be made by any person who does not come within either of the following classes:

(a) Married women, except as hereinafter stated.

(b) Persons who have already made homestead entry, except as hereinafter stated.

(c) Foreign-born persons who have not declared their intention to become citizens of the United States.

(d) Persons who are the owners of more than 160 acres of land in the United States.

(e) Persons under the age of 21 years who are not the head of families, except minors who make entries as heirs, as hereinafter mentioned.

(f) Persons who have acquired title to or are claiming, under any of the agricultural public-land laws, through settlement or entry made since August 30, 1890, any other lands which, with the lands last applied for would amount in the aggregate to more than 320 acres. Exception is made, however, as to an entry under one of the enlarged homestead acts, which may be allowed provided

applicant's claims under the timber and stone, desert land, and preemption laws do not make up approximately 320 acres, and do not with the homestead claim aggregate more than 480 acres; also, as to an entry under the stock raising law, which may be allowed, provided its area does not make up with such other claims more than 800 acres, and that said claims do not contain as much as 320 acres. The rules as to limitation on the area of additional entries under the last mentioned act are set forth in the special circular issued thereunder.

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How Homestead Entries Are Made

16. A homestead entry may be made by the presentation to the land office of the district in which the desired lands are situated of an application properly prepared on blank forms prescribed for that purpose and sworn to before either the register or the receiver, or before a United Statss commissioner, or the judge or clerk of a court of record, in the county or parish in which the land lies, or before any office of the classes named who resides in the land district and nearest or most accessible to the land, although he may reside outside of the county in which the land is situated. An application is not acceptable if executed more than 10 days before its filing at the land office.

17. Each application to enter and the affidavits accompanying it must recite all the facts necessary to show that the applicant is acquainted with the land; that the land is not, to the applicant's knowledge, either saline or mineral in character; that the applicant possesses all of the qualifications of a homestead entryman; that the application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons, or corporation; that the applicant will faithfully and honestly endeavor to comply with the requirements of the law as

to settlement, residence, and cultivation necessary to acquire title to the land applied for; that the applicant is not acting as the agent of any person, persons, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof; that the application is not make for the purpose of speculation, but in good faith to obtain a home for the applicant and that the applicant has not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person or persons, corporation or syndicate whatsoever by which the title he may acquire from the Government to the lands applied for shall inure, in whole or in part, to the benefit of any person except himself. Additional statements as to the character of the land must be made in applications under the enlarged homestead acts and under the stock-raising law; but in the latter no allegation as to minerals is to be made, as these are reserved to the Government under that law.

18. All applications by persons claiming as settlers must, in addition to the facts required in paragraph 17, state the date and describe the acts of settlement under which they claim a preferred right of entry, and applications by the widows, devisees, or heirs of settlers must state facts showing the death of the settler and their right to make entry, that the settler was qualified o make entry at the time of his death, and that the heirs or devises applying to enter are citizens of the United States or have declared their intentions to become such citizens, but they are not required to state facts showing any other qualifications of a homestead entryman, and the fact that they have made a former entry will not prevent them from making an entry as such heirs or devises, nor will the fact that a person has made entry as the heir or devisee of the settler prevent him from making

an entry in his own individual right if he is otherwise qualified to do so.

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20. Applications for entry must be accompanied by the proper fee and commissions. (See par. 41). A receipt for the money is at once issued, but this is merely evidence that the money has been paid and as to the purpose thereof. If the application is allowed and the entry placed of record, formal notice of this fact is issued on the prescribed form; if the application is rejected or suspended, notice of such action is forwarded to the applicant as soon as practicable.

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Residence And Cultivation Required Under The Homestead Laws

25. With the exception of adjoining farm homestead entries and additional entries allowed under certain conditions pursuant to the general law, the enlarged homestead acts and the stock-raising law, a homestead entryman must establish residence upon the tract entered within six months after the date of the entry, unless an extension of time is allowed, as explained in paragraph 35, and must maintain residence there for a period of three years. However, he may have credit for residence as well as cultiavtion before the date of entry if the land was during the period in question, subject to appropriation by him or included in an entry against which he had initiated a contest resulting afterwards in its cancellation. Moreover, he may absent himself for a portion or portions of each year after making entry and establishing residence as more fully explained in paragraph 26.

When proof is submitted it must be shown that the homesteader is a citizen of the United States, provided, however, that a homestead entrywoman who is a citizen when she makes her filing and thereafter marries an

alien need not show that her husband is an American citizen but must show that he is entitled to become one.

26. During each year, beginning with the date of establishment of actual residence, the entryman may absent himself from the land for not more than two periods, aggregating as much as five months. In order to be entitled to such absence the entryman need not file applications therefor, but must each time he leaves the land file at the local land office (by mail or otherwise) notice of the time of leaving; and upon his return to the land he must notify said office of the date thereof. If he has returned after an absence of less than five months and filed notice of his return, he may without any intervening rseidence, again absent himself—pursuant to new notice —for the remaining part of the five months within the residence year. However, two absences in different residence years, reckoned from the date when residence was established, must be separated by substantial periods if they together make up more than five months.

27. (a) Cultivation of the land for a period of at least two years is required, and this must generally consist of an actual breaking of the soil, followed by planting, sowing of seed, and tillage for a crop other than native grasses. However, tilling of the land, or other appropriate treatment, for the purpose of conserving the moisture with a view of making a profitable crop for the succeeding year, will be deemed cultivation within terms of the act (without sowing of seed), where that manner of cultivation is necessary or generally followed in the locality.

During the second year no less than one-sixteenth of the area entered must be actually cuiticated, and during the third year, and until final proof, cultivation of not less than one-eighth must be had. These requirements are the same as to homesteads under the general law and under enlarged homestead acts, and the years in question

bgin to run, not from the establishment of residence, but from the date of the entry. A larger amount of cultivation is required on entries under section 6 of the enlarged homestead acts, (see paragraphs 49 and 50), and the above mentioned rules are not applicable to entries under the reclamation act. No cultivation whatsoever is required under the so-called Kinkaid Act which affects only Nebraska, while the stock-raising homestead law requires no specific area of cultivation, only that the land has been actually used for raising stock and forage crops, and that it has been improved under certain conditions.

(b) The Secretary of the Interior is authorized to reduce the requirements as to cultivation. This may be done, if the land entered is so hilly or rough, the soil so alkaline, compact, sandy or swampy, or the precipitation of moisture so light as not to make cultivation of the required amounts practicable, or if the land is generally valuable only for grazing. An application for reduction upon the grounds indicated must be filed at the proper local land office on the form prescribed therefor, and should set forth in detail the special physical condition of the land on which claimant bases his right to a reduction.

A right of reduction may be allowed if the entryman, after making entry and establishing residence, has met with misfortune which renders him reasonably unable to cultivate the prescribed area. In this class of cases an application for reduction is not to be filed, but notice of the misfortune and of its nature must be submitted to the register of the local land office, under oath, within 60 days after its occurence; upon satisfactory proof regarding the misfortune at the time of submitting final proof a reduction in area of cultivation during the period of disability following the misfortune may be permitted.

(c) The homestead entrymen must have a habitable house upon the land entered at the time of submitting proof. Other improvements should be of such character and amount as are sufficient to show good faith.

(d) By paragraph 15 of the instructions of November 1, 1913, the Secretary of the Interior (under his statutory authority to reduce the requirements as to cultivation) has prescribed the following rule to govern action on proofs submitted under the new law, where the homestead entry was made prior to June 6, 1912:

Respecting cultivation necessary to be shown upon such an entry, in all cases where, upon considering the whole record, the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one-sixteenth for one year and of at least one-eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed.

(e) Entries made prior to June 6, 1912, may be perfected either by showing compliance with the requirements of the three-year act of June 6, 1912, or with the provisions of the old homestead law. The former law required five years' residence, there being no specific provision regarding the extent to which the entryman might absent himself; it made no requirement of cultivation of a specific proportion of the area of the entry, but the claimant was obliged to show such cultivation as was reasonable under the circumstances of the case.

(f) Where a qualified person settled upon a tract of unsurveyed public land, subject to settlement, prior to the passage of the act of June 6, 1912, but made entry after its enactment or may hereafter make entry, he may submit proof under said act or under the law existing when he established his residence upon the land. The filing of a formal notice is not required, but the designation of three-year or five-year proof in the notice to submit same may constitute such election.

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When Proof May Be Submitted

37. Either final or commutation proof may be made at any time when it can be shown that there is a habitable house upon the land and that the required residence and cultivation have been had. Proof on an entry made before June 6, 1912, may be submitted within seven years after its date, though it be submitted under the three-year act; proof on an entry made after June 6, 1912, must be submitted within five years, except under the conditions explained in paragraph 27f. Failure to submit proof within the proper period is ground for cancellation of the entry unless good reason for the delay appears; satisfactory reasons being shown, final certificate may be issued, and the case referred to the board of equitable adjudicaiton for confirmation. See also paragraph 27e.

Who May Submit Proof

38. (a) Final proof must be made by the entrymen personally or their widows, heirs or devisees, and can not be made by agents, attorneys in fact administrators or executors, except as explained in paragraphs 10, 22, and 34. Final proof can be made only by citizens of the United States.

(b) Where entires are made and proof offered for minor orphan children of soldiers or sailors the minors may be represented by their guardian.

How Proofs May Be Made

39. Final or commutation proofs may be made before any of the officers mentioned in paragraph 16 as being authorized to administer oaths to applicants.

Any person desiring to make homestead proof should first forward a written notice of his desire to the register and receiver of the land office, giving his postoffice address, the number of his entry, the name and the official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name

and postoffice address of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law.

Fees On Entries And Final Proofs

41. Fees and commissions.—When a homesteader applies to make entry he must pay in cash to the receiver a fee of $5 if his entry is for less than 81 acres, or $10 if he enters 81 acres or more and in addition to this fee he must pay, both at the time he makes entry and final proof, a commission of $1 for each 40-acre tract entered outside of the limits of a railroad grant and $2 for each 40-acre tract entered within such limits. Fees under the enlarged-homestead act and under the stock-raising homestead act are the same as above, but the commissions are based upon the area of the land embraced in the entry. (See par. 43). Where an entry is commuted no commissions are payable, except in connection with certain ceded Indian lands, as to which inquiry must be made specifically at the proper local land offices. On all final proofs, made before either the register or receiver, or before any other officer authorized to take proofs, the register and receiver are entitled to receive 15 cents for each 100 words reduced to writing and no proof can be accepted or approved until all fees have been paid.

In all cases where lands are entered under the homestead laws in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming the commissions due to the register and receiver on entries and final proofs, and the testimony fees under final proofs are 50 per cent more than those above specified, but the entry fees of $5 or $10, as the case may be, is the same in all the States.

Remittances of moneys to the local land offices must be made in cash or currency; but certified checks where drawn in favor of the receiver of public moneys on Na-

tional and State banks and trust companies, which can be cashed without cost to the Government, can be used. Likewise, United States postoffice orders are acceptable when they are made payable to the receiver and are drawn on the postoffice at the place where the receiver is located.

Alienation Of Land By Homesteader

42. The alienation of all or any part of the land embraced in a homestead prior to making proof, except for the public purposes mentioned in section 2288, Revised Statutes (see Appendix No. 1), will prevent the entrymen from making satisfactory proof, since he is required to swear that he has not alienated any part of the land except for the purposes mentioned in section 2288, Revised Statutes.

A mortgage by the entrymen prior to final proof for the purpose of securing money for improvements or for any other purpose not inconsistent with good faith, is not considered such an alienation of the land as will prevent him from submitting satisfactory proof. In such a case, however, should the entry be cancelled for any reason prior to patent, the mortgagee would have no claim on the land or against the United States for the money loaned

Alienation after proof and before patent.—The right of a homestead entryman to patent is not defeated by the alienation of all or a part of the land embraced in his entry after the submission of final proof and prior to patent, provided the proof submitted is satisfactory.. Such an alienation is, however, at the risk of the entryman, for if the reviewing officers of the Land Department subsequently find the final proof so unsatisfactory that it must be wholly rejected and new proof required, the entryman can not then truthfully make the non-alienation affidavit required by section 2291, Revised Statutes and his entry must in consequence be cancelled. The purchaser takes no better title than the entryman had, and if

the entry is canceled the purchaser's title must necessary fail.

In 1902 U. S. Reclamation law was passed, providing for the assistance of the Federal Government in reclaiming by irrigation the arid lands of the West. (Act of June 17th, 1902 Ch. 1093, Sec. 1, 32 Stat. at 388, Vol..... Federal Statutes Annotated Page..... Par. 4226 Barnes Federal Code, Page 966.) This act as amended as far as pertinent, follows:

(*Act of June 17, 1902, 32 Stat., 388.*)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming, beginning with the fiscal year ending June 30th, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above State set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act: Provided, That in case the receipts from the sale and disposal of Public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in several States and Territories, under the act of August thirtieth, eighteen hun-

dred and ninety, entitled "An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the suport of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage ,diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also, the cost of works in process of construction as well as of those which have been completed.

Sec. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of begining the surveys for any contemplated irrigationworks, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptable to irrigation from said works; Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that

said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable, he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: Provided: That the commutation provisions of the homestead laws shall not apply to entries made under this act.

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also, of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably; Provided, That in all construction work eight hours shall constitute

a day's work, and no Mongolian labor shall be employed thereon.

Sec. 5. That the entryman upon lands to be irrigated by such work shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

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(*Act of June 27, 1906, 34 Stat., 519.*)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that whenever in the opinion of the Secretary of the Interior, by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the reclama-

tion act, he may fix a lesser area than forty acres as the minimum entry, and may establish farm units of not less than ten or more than one hundred and sixty acres. That wherever it may be necessary, for the purpose accurate description, to further subdivide lands to be irrigated under the provisions of said reclamation act, the Secretary of the Interior may cause subdivision surveys to be made by the officers of the reclamation service, which subdivisions shall be rectangular in form, except in cases where irregular subdivisions may be necessary in order to provide for practicable and economical irrigation. Such subdivision surveys shall be noted upon the tract book in the General Land Office, and they shall be paid for from the reclamation fund: Provided, that an entryman may elect to enter under said reclamation act a lesser area than the minimum limit in any state or Territory.

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(*Act June 23, 1910, 36 Stat., 592.*)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvements, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundrd and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: Provided, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the Reclamation Act.

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(Act August 9, 1912, 37 Stat., 265.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any homestead entryman under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation and cultivation, submit prooof of such residence, reclamation and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water right certificates on reclamation projects shall be entitled to a final water right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation act for homestead entrymen: Provided, That no such patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid.

Sec. 2. That every patent and water right certificate issued under this act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights.

Upon default of payment of any amount so due title to the land shall pass to the United States free of all encumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with eight per centum interest and cost. And the United States, at its option, acting

through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided and costs. The balance of the proceeds, if any, shall be the property of the defaulting debtor or his assignee: Provided, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at not more than the amount in default, including interest and costs.

Sec. 3. That upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterement charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect except the lien for annual charges for operation and maintneance: Provided, That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water right application shall have been made under the said reclamation act of June seventeenth, nineteen hundred and two, and acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of 160 acres, nor shall water be furnished under said acts nor a water right sold or recognized for such excess, but any such excess land acquired at any time in good faith by decent, by will, or by foreclosure of any lien be held for two years and no longer after its acquisition; and every excess holding prohibited as afore-

said shall be forfeited to the United States by Preceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water right certificate issued by the United States under the provisions of this act.

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Sec. 5. That jurisdiction of suits by the United States for the enforcement of the provisions of this act is hereby conferred on the United States district courts of the districts in which the lands are situated.

(Act May 8, 1916, Public No. 72, 64th Cong.)

Be it enacted by the senate and house of Representatives of the United States of America in Congress assembld, That the act of June twenty-third, nineteen hundred and ten (Public, Two hundred and forty-three, Thirty-sixth Statutes, Page five hundred and ninety-two), entitled "An act providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years, the same as though said entry had been made under the original homestead act," is hereby amended by adding the following proviso:

"Provided, That in the absence of any intervening valid adverse interests any assignment made between June twenty-third, nineteen hundred and ten, and January first, nineteen hundred thirteen, of land upon which the assigor has submitted satisfactory final proof and the assignee purchased with the belief that the assignment was valid and under the act of June twenty-third nineteen hundred and ten, is hereby confirmed, and the assignee shall be entitled to the land assigned as under the act of June twenty-third, 1910, notwithstanding that said original entry was conformed to form said units and that the part assigned was canceled and eliminated from said entry prior to the date of final proof: Provided, further, That all entries so assigned shall be subject to

the liitations, terms, and conditions of the reclamation act and acts amendatory thereof or supplemental thereto, and all of said assignees whose entries are hereby confirmed shall as a condition to receiving patent, make the proof heretofore required of assignees. * * *"

Under the authority vested in him, the Secretary of the Interior, from time to time through the general land office, issues and has issued regulations governing the application and administration of the United States Reclamation Homestead Law. The material provisions of the present regulations, (Approved May 10th, known as the "General Circulation Circular"), are as follows:

LAWS AND REGULATIONS

Relating to the Reclamation of Arid Lands by the United States.

Regulations

This circular contains only the laws specifically applying to reclamation homestead entries and water right applications and regulations thereunder, but does not contain the general homestead laws, most of which also apply to reclamation homestead entries.

General Information

1. Section 3 of the act of June 17, 1902 (32 Stat., 388), provides for the withdrawal of lands from all disposition other than that provided for by said act. Lands withdrawn as susceptible of irrigation (usually referred to as withdrawn under the second form) are subject to entry under the provisions of the homestead law only, and since the passage of the act of June 25, 1910 (36 Stat., 835), are open to settlement or entry only when approved farm-unit plats have been filed and water is ready to be delivered to the land in said farm units or some part thereof and such

fact has been announced by the Secretary of the Interior, except as provided by the act of February 18, 1911 (36 Stat., 917), as amended by section 10 of the act of August 13, 1914 (38 Stat., 686). Where settlements had been effected in good faith prior to June 25, 1910, on lands embraced within second-form withdrawals, persons showing such settlement are entitled to complete entry in the manner and within the time provided by law. The reclamation act of June 17, 1902, and acts amendatory thereof or supplementary thereto are hereinafter referred to generally as the reclamation law.

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5. Homestead entries of lands platted to farm units and covered by public notice are made practically in the same manner as the ordinary homestead entry, and registers will allow homestead applications for such lands, if found regular, and accompanied by a certificate of the project manager showing that water-right application has been filed and the proper water-right charges deposited. No application to make homestead entry of lands within a reclamation project and covered by public notice will be received unless accompanied by such certificate of the project manager. Where under the reclamation law lands within the reclamation project are subject to entry notwithstanding public notice covering said lands has not yet issued, such certificate of the project manager is not required ,and in such cases the application, if otherwise regular, will be received and entry allowed. The register and receiver will immediately notify the project manager of each entry allowed, stating whether the entry was allowed with or without the certificate of the project manager above referred to.

6. Registers and receivers will indorse across the face of each homestead application, when allowed under the reclamation act, the following: "This entry allowed subject to the provisions of the act of June 17, 1902 (32 Stat.,

388)," and will advise each entryman of the provisions of the act by furnishing him with a copy of this circular.

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10. The farm units as be as small as 10 acres where the lands are suitable for fruit raising, etc., but on most projects so far they have been fixed at from 40 to 80 acres each. These areas are announced on farm-unit plats, and public notice stating the amount of the charges and other details concerning payment is issued by the Secretary of the Interior. Until this public notice is issued it will be impossible in most respects to give definite information as to any particular tract or as to the details intended to be covered by such notice; but registers and receivers will, upon inquiry, give all general information relative to the public lands including in reclamation projects and will keep the project managers of the Reclamation Service fully informed by correspondence as to conditions affecting the same.

Withdrawals And Restorations

11. The withdrawal of these lands at first is principally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed. Only a portion of the lands will be irrigated, even if the project is feasible, but it will be impossible to decide in advance of careful examination what lands may be watered, if any, and the mere fact that surveys are in progress is no indication whatever that the works will be built. It can not be determined how much water there may be available or what lands can be covered or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed.

12. There are two classes of withdrawals authorized by the act—one commonly known as "withdrawals under the first form," which embraces lands that may possibly be needed in the construction and maintenance of irriga-

tion works, and the other, commonly known as "withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works.

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18. Should a homestead entry embrace land that is needed in whole or in part for purposes contemplated by said proviso in the act of August 30, 1890, the land would be taken for such purpose, and the entryman would have no claim against the United States for the same.

19. All withdrawals become effective on the date upon which they are ordered by the Secretary of the Interior, and all orders for restorations on the date they are received in the local land office unless otherwise specified in the order. (George B. Pratt et al., 38 L. D., 146).

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21. Where the Secretary of the Interior by the approval of farm- unit plats has determined, or may determine, that the lands designated thereon are irrigable, the filing of such plats in the General Land Office and in the local land offices is to be regarded as equivalent to an order withdrawing such lands under the second form, and as an order changing to the second form any withdrawals of the first form then effective as to any such tracts. This applies to all areas shown on the farm-unit plats as subject to entry under the provisions of the reclamation law or as subject to the filing of water-right applications, and to all farm units to which the Secretary has announced that water is ready to be delivered. Upon receipt of such plats appropriate notations of the change of form of withdrawal are to be made in accordance therewith upon the records of the General Land Office and of the local land offices.

22. Inasmuch as every entry made under the reclamation law is subject to conformation to an established

farm unit, improvements placed upon the different subdivisions by the entryman prior to such conformation are at his risk. (Jerome M. Higman, 37 L. D., 718). They should be confined to one legal subdivision until the entry is conformed. In readjusting such an entry the Secretary is not required to confine the farm unit to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract lying outside of the entry, so as to equalize in value the several farm units. (Idem.) The act of June 27, 1906, authorizes the Secretary of the Interior to fix a lesser area than 40 acres as a farm unit when, "by reason of market conditions and special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than 40 acres may be sufficient for the support of a family" or when necessary "in order to provide for practical and economical irrigation."

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Contests.

29. An entry embracing lands included within a first or second form reclamation withdrawal, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason ,except that for failure to pay the construction charges or charges for operation and maintenance, no contest will lie, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first form withdrawal at time of successful termination of the contest the preferred right may prove futile, for it can not be exercised as long as the land remains so withdrawn, but should the lands involved be restored to the pubic domain or a farm-unit plat be approved for the lands and announcement made that water is ready to be delivered, the preference right may be exercised at any time within 30 days from notice

of the restoration or the establishment of farm units. Should the land be within a second-form withdrawal, the successful contestant can not be allowed to exercise his preference right of entry prior to the time when the Secretary shall have established the unit of acreage and announced the fact that water is ready to be delivered to the land in said farm unit or some part thereof, but when the farm unit is established and water available as stated, he may make entry under the terms of the reclamation law. If, however, the land at any time be released from all forms of withdrawal, he may enter as in other cases made and provided. It should be the duty, however, of such contestant to keep the local officers advised respecting his residence to which notice may be sent him of his preference right of entry in event of successful contest, when the land is subject to entry, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the act of May 14, 1880 (21 Stat., 140). No contest can be allowed, however, against any qualified entryman who prior to June 25, 1910, made bona fide entry upon lands proposed to be irrigated and who established residence in good faith upon the lands entered by him for failure to maintain residence or to make improvements upon his land prior to the time when water is available for its irrigation.

30. Under these regulations the filing of contests will be allowed against homestead entries made subject to the reclamation law in the following cases:

(a) Where the entry was made on or after June 25, 1910.

(b) Where the entry was made prior to June 25, 1910, and it is alleged that the entryman failed to establish residence in good faith upon the lands entered by him.

(c) Where the entry was made prior to June 25, 1910, and a period of 90 days has elapsed since the issuance of public notice under section 4 of the reclamation act of June 17, 1902 (32 Stat., 388), fixing the date when water will be available for irrigation of the land.

(d) Where the entry was made prior to June 25, 1910, for any causes other than "failure to maintain residence or make improvements upon the land prior to the time when water is available."

Assignments.

35. Under the provisions of the act of June 23, 1910 (36 Stat., 592), persons who have made or may make homestead entries subject to the reclamation law may assign their entries in their entirety at any time after filing in the local land office satisfactory proof of the residence, improvements, and cultivation required by the ordinary provisions of the homestead law. The act also provides for the assignment of homestead entries in part, but such assignments, if made after farm units are established, must conform thereto, except as hereinafter provided. (See pars. 36 to 39).

36. In cases where the entry involves two or more farm units, the entryman may file an election as to which farm unit he will retain, and he may assign and transfer to a qualified assignee any farm unit or farm units entirely embraced within the original entry. He may also assign parts of farm units included in his entry, provided the assignee has an entry covering or obtains an assignament of the remainder of such unit. If an election by the entryman to conform to a farm unit be filed and no assignament made of the remainder of the entry, the entry will be conformed to the farm unit selected for retention and canceled as to the remainder.

37. Where it is desired to assign a part of an established farm unit, an application for the amendment and subdivision of such unit should be filed with the pro

ject manager. The assignment, with accompanying affidavits of the assignee and assignor, must also be filed with the project manager for his consideration.

38. If a survey shall be found necessary to determine the boundaries of the subdivision of any such farm unit, or the division of the irrigable area, a deposit equal to the estimated cost of such survey must be made with the special fiscal agent, Reclamation Service on the project by or on behalf of the parties concerned. Any excess over the actual cost will be returned to the depositor or depositors after completion of the survey, and they will also be required to make good any deficiency in their deposit.

39. When the plats describing the amended farm units are approved by the project manager, he will forward copy of the amendatory plat, in duplicate, together with the assignment and accompanying affidavits, to the local land office, where one copy of the amendatory plat will be retained, and one copy will be forwarded by the local land officers to the General Land Office ,together with the assignment and accompanyin gafidavits... A copy of the amendatory plat should also be at once forwarded by the project manager to the director's office at Washington, D. C., to be formally approved in the usual manner by authority of the Secretary.

40. No assignment of a homestead entry or any part thereof shall be accepted by the Commissioner of the General Land Office, or recognized as valid for any purpose, until after the filing in the local land office of the instruments required by paragraph 41.

41. Assignments under this act are expressly made "subject to the limitations, charges, terms, and conditions of the reclamation act," and inasmuch as the law limits the right of entry to one farm unit and forbids the holding of more than one farm unit prior to payment of all construction or building and betterment charges each assignor must present a showing in the form of an affidavit to the effect that the assignment is an absolute sale, di-

vesting him of all interest in the premises assigned, and each assignee must present a showing in the form of an affidavit that he does not own or hold and is not claiming any other farm unit or entry under the reclamation law upon which all installments of construction or building and betterment charges have not been paid in full and has no existing water-right applications covering an area of land which, added to that taken by assignment, will exceed 160 acres, or the maximum limit of area fixed by the Secretary of the Interior. If the assignee is a woman, it must be shown whether she is married or single, and if a married woman it must be shown that the assignment is purchased with her own separate money, in which her husband has no interest or claim (39 L. D., 504, and Sadie A. Hawley, 43 L. D., 361). These affidavits must be accompanied by evidence of the conveyance of the land, as indicated in paragraph 42, and a further showing in the form of a certificate of the project manager that water-right application therefor is not yet receivable, or that the assignee has filed in the project office for acceptance a water-right application in due form for the land embraced in the assignment.

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42. Assignments may be effected by quitclaim or warranty deed or by any other form of conveyance in general use in the State in which the land is located, but a quitclaim or warranty deed is preferred. The original instrument of assignment, or where the instrument is recorded, a copy thereof certified by the officer who has custody of the record will be accepted. Where the original instrument of assignment is presented to an officer having an official impression seal, a copy of the instrument certified by such officer under his seal will be accepted if accompanied by satisfactory evidence of compliance with the documentary stamp tax provisions of the internal revenue law.

43. Assignments made and filed in accordance with

these regulations must be noted on the local land office records and at once forwarded to the General Land Office for immediate consideration. Where an assignment which does not fully comply with the above regulations is presented to the local land office the register and receiver will reject same, subject to the right of appeal to the Commissioner of the General Land Office in accordance with the rules of practice. Upon the approval of an assignment, the assignee will at th eproper time make payment of the water-right charges and submit proof of reclamation as would the original entryman, and, after proof of full compliance with the law, may receive a patent for the land.

Mortgages.

14. Mortgagees of land embraced in homestead or desert-land entries within reclamation projects may file in the local land office for the district in which the land is located a notice of such mortgage interest, and shall thereupon become entitled to receive and be given the same notice of any contest or other proceedings thereafter had affecting the entry as is required to be given the entryman in connection with such proceedings, and a like notice of mortgage interest may be filed with the project manager in case of any lands, whether or not water-right application has been filed under the provisions of the act of June 17, 1902 (32 Stat., 388), including homestead entries, desert-land entries, and lands in private ownership; and thereupon the mortgagee shall receive copies of all notices of default in payment of the water-right charges levied by the Secretary of the Interior against such lands, and shall be permtted to make payment of the amount so in default within 60 days from the date of such notice. Any payment so made shall be credited on the charges levied by the Secretary of the Interior against such lands.

15. Every such notice of mortgage interest filed as provided in the preceding paragraph must be forthwith

noted upon the records of the project manager and of the local land office, and be promptly reported to the Director of the Reclamation Service and to the Commissioner of the General Land Office, where like notations will be made. Relinquishment of a homestead or desert-land entry or part thereof within a reclamation project, upon which final proof has been submitted, where the records show the land to have been mortgaged, will not be accepted or noted unless the mortgagee joins therein; nor will an assignment of such a homestead entry or part thereof under the act of June 23, 1910 (36 Stat., 592), nor an assignment of a mortgaged desert-land entry where the records show the land to have been mortgaged, be recogonized or permitted unless the assignment specifically refers to such mortgage and is made and accepted subject thereto.

46. If such mortgagee buy in the land at foreclosure sale, such mortgagee-purchaser, whether a non-resident or corporation, may, at any time within one year after the end of the statutory period of redemption, if there be such statutory period, and if not, at any time within one year after such foreclosure sale, make proof of cultivation and reclamation of the land under section 1 of the act of August 9, 1912 (37 Stat., 265), and receive final water-right certificate, provide dsuch mortgagee-purchaser is otherwise qualified so to do. Water will be furnished said land, and no steps will be taken to cancel the water-right application on account of the holdings by the same mortgagee-purchaser of lands in excess of 160 acres, or the limit per single ownership of private land as fixed by the Secretary of the Interior for which a water right may be purchased, until two years after such foreclosure purchase, provided that all charges in connection with the water-right application that may be due at the time of the foreclosure sale and all such charges that may become due during the period when the land is held under the terms hereof shall be promptly paid by or on behalf of such mortgagee-purchaser. To secure the benefits hereof, the mortgagee

purchasing the lan dat foreclosure sale, must give notice thereof to the register of the local land office and to the officer in charge of the project within 60 days after such purchase.

Cancellation.

47. All homestead and desert-land entrymen holding land under the reclamation law must, in addition to paying the water-right charges, reclaim the land as required by the reclamation law. Homestead entrymen must reside upon, cultivate, and improve the lands embraced in their entries for not less than the period required by the homestead laws. Desert-land entrymen must comply with the provisions of the desert-land laws as amended by the reclamation law. Failure to make any two payments when due, or to reclaim the land as required by law, will render the entry subject to cancellation and the money paid subject to forfeiture, whether water-right application has been made or not. Upon receipt of a statement from the Director of the Reclamation Service that two of such payments remain due and unpaid, after proper service upon the entrymen and upon the mortgagee, if any such there be of record, of the notice required by paragraph 111 of this circular, the date and manner of service being stated, the entry will, without further notice, be canceled by the Commissioner of the General Land Office.

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Final Proofs, Certificates, and Patents

50. Where the tract covered by a homestead or desert- land entry has been withdrawn under either the first or the second form after the date of said entry, the register and receiver are directed to immediately furnish the project manager a copy of any notice of intention to submit proof thereon, this being in addition to the copy furnished in all cases to the Chief of Field Division. The Reclamation Service may file such papers as are thought proper bearing on the question whether there has been such compliance with the law on claimant's part as en-

titles him to final certificate and patent on the entry. Final certificate will, in the absence of other objection, issue pursuant to the proof, as in other cases, if the testimony appears to warrant such action and no papers have been filed by the Reclamation Service conducing to disprove the testimony; in the event of the filing of such papers, however, the record will be forwarded to the General Land Office for consideration.

51. Where an entry has been made after withdrawal of the tract under the second form, a copy of the notice of intention to submit proof will be sent to the project manager; in such cases the register and receiver will forward the proof, if found to be regular, to the General Land Office without issuance of final certificate, unless there has been submitted a final affidavit, duly corroborated by two witnesses and approved by the project manager ,showing compliance with the reclamation act as to payment of all charges due to date and reclamation of one-half of the irrigable area in the entry, as provided for in paragraph 59. If such affidavit showing reclamation and payment of charges is filed and the final proof of compliance with the ordinary provisions of the homestead law as to residence, improvements, and cultivation is found on examination by the local land officers to be sufficient, they will issue final certificate on the case as hereinafter provided.

52. If any final proof offered under this law be irregular or insufficient, the register and receiver will reject it and allow the entryman the usual right of appeal, and if the General Land Office finds any proof forwarded to be insufficient or defective in any respect, whether or not final certificate has issued on the same, the final proof or certificate may be held for rejection or cancellation and the entryman will be notified of that fact, or he may be given an opportunity to cure the defector to present acceptable proof.

53. The registers and receivers are directed to notify, in writing, every person who makes final proof on a

homestead entry which is subject to the limitations and conditions of the reclamation law embracing land included in an approved farm-unit plat where the entry does not conform to an established farm unit and where two years have elapsed since the approval of such farm-unit plat that 30 days from notice is allowed the entryman to elect the farm unit he desires to retain and to file an assignment of the remainder of his entry under the act of June 23, 1910 (36 Stat., 592), in default of which the entry will be conformed by the General Land Office and canceled as to the portion not assigned.

54. All persons who make entry of lands within the irrigable area of any project commenced or contemplated under the reclamation law will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the lands, except that where entries were made prior to the issuance of public notice announcing the availability of water for the irrigation of the land and prior to June 25, 1910, in which case, under the departmental decision in the case of ex parte J. H. Haynes (40 L. D., 291) and under the provisions of the act of April 30, 1912 (37 Stat., 105), the submission of final proof is not required withi nthe period during which proof must be submitted under the ordinary provisions of the homestead law.

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56. Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead law and have submitted proof which has been found satisfactory thereunder by the General Land Office, but who are unable to furnish proof of reclamation because water has not been furnished to the lands or farm units have not been established, will be excused from further residence on their lands and will be given a notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the

entry, as finally adjusted to an approved farm unit, and payment of all charges due under the public notices and orders issued in pursuance of the reclamation law.

57. The act of August 9, 1912 (37 Stat., 265), expressly requires reclamation of one-half of the irrigable area of the entry as finally adjusted before final certificate and patents may issue thereunder, and, therefore, the act does not authorize the issuance of final certificate on homestead entries made subject to the reclamation law prior to the establishment by the Secretary of the Interior of farm units, and the conformation of the entry to an approved unit, for the reason that prior to that time the entry is still subject to adjustment in area, and it can not be determined what area must be ultimately reclaimed under the provisions of the act.

58. Upon the tendering to registers and receivers of homestead proof on entries subject to the reclamation law, they will accept only the testimony fees for "reducing testimony to writing and examining and approving testimony," and will not accept final commissions payable under such entries until proof is received of compliance with the requirements of the reclamation law as to reclamation and payment of the charges which have become due.

59. Homestead and desert-land entrymen, in making proof of compliance with the reclamation law as to reclamation and payment of reclamation charges due, must submit an affidavit, duly corroborated by two witnesses, in duplicate, to the project manager showing these facts. Thereupon it shall be the duty of the project manager to verify the statement as to payment and also make such examination of the land as will enable him to determine whether reclamation as required by law and the regulations has been made. If he finds that the statement as to payment be correct he will so certify, which certificate will also show the date on which the next payment is due; but if he finds that all payments have not been made as

required he will advise the entryman thereof, requiring him to pay the amounts found to be unpaid and due, with a right of appeal in the entryman from such requirement to the Director of the Reclamation Service and ultimately to the Secretary of the Interior. Should he find that reclamation has been accomplished he will so certify but if he finds that reclamation has not been accomplished as required he will forward the proofs to the register and receiver of the land district in which the land is situate, with his report or findings thereon, and such officers will thereupon in turn transmit the showing to the General Land Office for its action. If the proof be rejected by the Commissioner of the General Land Office, appeal will lie to the Secretary of the Interior, as in other cases provided, it being the purpose to issue final certificates upon any such entry only after a final determination that all water charges due on account thereof have been paid and that reclamation has been accomplished as required by the reclamation law. Where prior to issuance of public notice water has been furnished on a water-rental basis to reclamation entrymen or others, and by means whereof reclamation sufficient to obtain patent or water-right certificate under the act of August 9, 1912, has been accomplished and satisfactory proof made, water-right applications may be received from such entrymen or others desiring to obtain patent or water-right certificate under that act upon the form of application approved by the department ,modified so as to refer to the irrigable acreage and the charge per acre as thereafter announced by the Secretary. In such cases reclamation homestead entries must be conformed to farm units as established by the Secretary of the Interior. If not therefore created, farm units may be established upon application.

60. To comply with the provisions of the reclamation laws as to reclamation and cultivation, the land must be cleared of brush, trees, and other encumbrances, provided with sufficient laterals for its effective irrigation,

graded and otherwise put in proper condition for irrigation and crop growth, planted, watered, and cultivated, and during at least two years next preceding the date of approval by the project manager of proof of reclamation, except as prevented by hailstorm or flooding, satisfactory crops must be grown on at least one-half of the irrigable area thereof. A satisfactory crop during any year shall be any one of the following: (a) A crop of annuals producing a yield of at least one-half of the average yield on similar land under similar conditions on the project for the year in which it is grown; (b) a substantial stand of alfalfa, clover, or of other perennial grass substantially equal in value to alfalfa or clover; or (c) a season's growth of orchard trees or vines of which 75 per cent shall be in a thrifty condition.

61. As to all lands subject to the reclamation extension act of August 13, 1914 (38 Stat., 686), at least one-quarter of the irrigable area thereof shall be so reclaimed within three full irrigation seasons after entry or making water-right application, and at least one-half of the irrigable area thereof so reclaimed within five full irrigation seasons after entry or making water-right application, except that the first full irrigation season affecting such land for which water-right application shall have been made prior to May 3, 1915, shall be the irrigation season of 1915. All land thus reclaimed and cultivated shall continue to be so reclaimed and cultivated until after final proof is made and accepted or patent or final water-right certificate issued. Failure to so reclaim lands subject to the said reclamation extension act renders the entry, or, in case of private land, the water-right application therefor, subject to cancellation.

62. Upon receipt of proof of reclamation and payment of water-right charges as provided in the acts of Augus t9, 1912, and August 26, 1912, in case of homestead entries under the reclamation law, on ceded Indian lands entered under the reclamation act, and in case of desert-land entries within the exterior limits of any land

withdrawal or irrigation project under the reclamation act, if final proof of compliance with the homestead or desert-land law, as the case may be, has been previously submitted and has been accepted by the Commissioner of the General Land Office, or if such final proof is submitted at the time of the receipt of proof of reclamation and payment of charges, and is found to be sufficient as to residence, improvement, and cultivation upon examination by the local land officers, the register and receiver will issue final certificate on the entry, proceeding in the usual manner, and forward the same with the proof of reclamation and payments to the General Land Office. The final certificate so issued must be stamped by the local land officers across the face of each certificate when issued as follows. "Subject to lien under section 2, act of August 9, 1912 (37 Stat., 265)." Upon receipt of such case in the General Land Office, if found to be regular, it will be approved for patent under said act of August 9, 1912, or August 26, 1912, and patent issued reserving the lien as in said acts provided.

63. Upon receipt of proof of reclamation and payment of water-right charges, as provided in the act of August 9, 1912, in the case of homestead entries, other than those under the reclamation act, where a water-right application has been filed by the entryman, and the register and receiver have been notified by the project manager of the acceptance of such application, if final proof has been accepted on the entry by the Commissioner of the General Land Office, or final proof is submitted at the time of the receipt of such reclamation proof and is found to be sufficient on examination by the local land officers, the register and receiver will issue final certificate of compliance with the homestead law, proceeding in the usual manner, and forward such final certificate, with proof of reclamation, to the General Land Office. When the case is received in the General Land Office and is found to be regular, it will be approved for patent and final water-right certificate will be issued by

the project manager, reserving a lien to the Government and its successor for the charges due or to become due.

64. The execution of final water-right certificate has the effect of vesting in the water-right applicant absolute title to the water right involved, subject in case of partial payment to a lien for the payment of all sums still due, and in all cases to payment of the annual charges for operation and maintenance; hence the necessity for extreme care in the preparation and issuance of these instruments.

65. The certificate should not be executed until the following notation (record completed) has been initialed by a responsible employee who shall have ascertained from a careful examination of the project records that full compliance has been made with the requirements of the law such as to entitle the applicant to the issuance of such certificate.

66. Upon the execution of the certificate, and before delivery to the water-right applicant, it shoul dbe recorded in the bound volume which has been provided for that purpose, care being exercised to make the record an exact copy of the original certificate. The person preparing the certificate and recording the same should initial the certificate and record, and will be held responsible for absolute accuracy in this respect; and to insure this the original should be checked with the record thereof in the bound volume.

The original must not be delivered until the signature has been copied on the record.

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71. In case of lands in private ownership and homestead entries made prior to reclamation withdrawal, reclamation is required to be shown before any final water-right certificate is issued upon a water-right application made for such lands under the reclamation law. Further, before issuance of such a certificate under the act of

August 9, 1912 (37 Stat., 265), on account of any lands so held, evidence must be filed satisfactorily showing that the applicant for water right has an unencumbered title to othe land, or, where encumbered ,the consent of the encumbrancers must be furnished in such form that the lien to be given the Government to secure the deferred payments on account of the water right shall, as contemplated by the law, constitute a prior lien upon the land. Upon the filing of such proofs with the project manager and the payment of all reclamation charges then due, he will issue a water-right certificate to the applicant which shall expressly reserve to the United States a prior lien on the land which a water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or demands whatsoever, to secure the payment of all sums due or to become due, to the United States or its successors. The project manager will forward all papers, including a copy of the certificate, to the Director of the Reclamation Service.

72. The Director of the Reclamation Service will, upon the full payment of all construction or building and betterment charges by any water user, issue certificate of the full payment of such charges releasing the lien therefor rserved in the final water-right certificate or patent under the act of August 9, 1912 (37 Stat., 265).

Under the foregoing laws relating to ordinary and reclamation entries and the regulations issued by the Secretary of the Interior trough the General Land Office, a homestead entryman is, inter alia, required to do the following things in order to comply with the requirements of the laws and regulations in question, and in order to qualify for the making of final proof and to establish compliance with such requirements:

1. *Establish residence upon the land within 6 months after the date of his entry.*

2. *Maintain a residence thereon for a period of not less than five years.*

3. *Establish proof of residence within five or seven years from date of entry.*

4. *Reduce his entry to conform to the established farm unit.*

5. *Clear the land entered of brush, trees and other incumbrances.*

6. *Provide the land with sufficient laterals for its effective irrigation.*

7. *Grade the land.*

8. *Put the land in proper condition for irrigating and crop growth.*

9. *Plant, water and cultivate for at least TWO YEARS NEXT PRECEDING THE TIME OF FILING FINAL AFFIDAVIT, at least one-half of the irrigable area of his entry.*

10. *Grow satisfactory crops upon the land.*

11. *Pay to the land office officials the sum of $1.50 for each legal subdivision, included in each farm unit, together with all charges due thereon.*

12. *Establish compliance wit hthe foregoing requirements by his testimony and testimony of at least two other witnesses to the satisfaction of the land office officials.*

Of the foregoing requirements, many remained to be performed at the time taxes were assessed against the lands in question.

Previous to the 18th day of January, 1917,—that being the date the Secretary of the Interior established the farm unit of the Salt River Project at 40 acres, manifestly the entrymen had not fulfilled the requirements of the law for the reason that the Farm Unit until that date had not been established, nor had the entries of the homesteader been reduced to conform with the established Farm Unit.

At the time, (January 18, 1917), the entryman

did not even know what land would finally belong to him, even assuming his compliance with the law.

Until the Farm Unit was established and until the entry of the homesteader had been conformed therewith, the homesteader had not complied with the law, and was not eligible to make Final Proof. The regulations governing Reclamation Homesteads in this regard provide as follows: (Par. 57, page 17, General Reclamation Circular Ante):

"The Act of August 9, 1912, (37 Stat., 265), expressly required reclamation of one-half of the irrigable area of the entry as finally adjusted before final certificate and patents may issue thereunder, and, therefore, the act does not authorize the issuance of final certificate on homestead entries made subject to the reclamation law, prior to the establishment by the Secretary of the Interior of farm units, and the conformation of the entry to an approved unit, for the reason that prior to that time the entry is still subject to adjustment in area, and it can not be determined what area must be ultimately reclaimed under the provisions of the act. * * *"

It will be observed that the under the General Homestead Law (a) Sec. 27, page 11, Suggestions to homesteaders and Persons Desiring to make Homestead Entries) that under the requirements of the General Homestead Law, the greatest amount of cultivation required does not exceed one-eighth of the entry.

Under the Reclamation Homestead Law, however, the entryman must reclaim and grow crops upon at least one-half of the irrigable area of his lands, and this cultivation required must be for the TWO YEARS IMMEDIATELY PRECEDING THE MAKING OF FINAL PROOF. Section 60, page 18, Reclamation Circular Ante, provided as follows:

"To comply with the provisions of the reclamation

law as to reclamation and cultivation, the land must be cleared of brush, trees and other encumbrances, provided with sufficient laterals for its effective irrigation, graded and otherwise put in proper condition for irrigation and crop growth, planted, watered, and cultivated, and during at least two years next preceding the date of approval by the project manager of proof of reclamation, except as prevented by hailstorm or flooding, satisfactory crops must be grown on at least one-half of the irrigable area thereof. A satisfactory crop during any year shall be any one of the following: (a) A crop of annuals producing a yield of at least one-half of the average yield on similar land under similar conditions on the project for the year in which it is grown; (b) a substantial stand of alfalfa, clover, or of other perennial grass substantially equal in value to alfalfa or clover; or (c) a season's growth of orchard trees or vines of which 75 per cent shall be in a thrifty condition."

It will therefore be seen that the making of proof of residence under the ordinary Homestead Law was not a sufficient Final Proof and that it was impoossible for the Homesteader to so comply as to cultivation until the establishment of the Farm Unit.

The reduction of the area necessitated the providing of irrigation ditches for each 40 acre tract and consequently until this was done, the homesteader was not eligible to make Final Proof in this regard and on the other hand such provision could not be made until the Unit was established. It is also apparent that until the farm unit was established, the homesteader could not make Final Proof or so comply with the law as to the cultivation of the land, and the raising of crops. What he might do, or have done on the 160 ace tract was not sufficient but he must deal with, and make his proof in regard to the 40 acre tract as finally established for Farm Unit. Until the making of Final Proof, the entryman was not required and did not

pay the entry fees due the Government. The provision of the Homestead Regulations, are as follaws: (Par. 58, page 17, General Reclamation Circular):

"Upon the tendering to registers and receivers of homestead proof on entries subject to the reclamation law, they will accept only the testimony fees for "reducing testimony to writing and examining and approving testimony," and will not accept final commissions payable under such entries until proof is received of compliance with the requirements of the reclamation law as to reclamation and payment of the charges which have become due. * * *"

It will be observed that the fees due the government are not paid on making proof of residence, but are payable on making final proof.

Under the above regulations the entrymen concerned in this suit were not required, and did not pay the fees to the Government until the making of Final Proof.

It is plain therefore that at the time the taxes were assessed against the lands in question, the Homesteader:

1. *Had not complied with the requirements of the laze as to reduction of his entry.*

2. *Had not complied with the requirements of the la zeas to cultivation.*

3. *Had not complied with the requirements of th claze as to grading.*

4. *Had not complied with the requirements of the laze as to providing laterals for irrigation.*

5. *Had not complied with the requirements of the laze as to putting the land in proper condition for irrigation and crop growth.*

6. *Had not complied with the requirements of the laze as to planting, watering, and cultivating the land for at least two years.*

7. Had not complied with the requirements of the law as to grazing of said crops on the land.

8. Had not complied with the requirements of the law as to the payment of fees due the Federal Government.

9. Had not established proof of compliance with the regulations of the law or regulations for his own testimony and the testimony of any corroborating witnesses by the making of a final proof.

Plainly then, beyond any question or argument the homesteader had not complied with the law; was not eligible for the making of Final Proof; and had not earned or acquired a legal or equitable interest within the law as administered by Land Department and construed by the United States Supreme Court in the cases cited herein.

We dwell upon this ineligibility of the homesteader, not because his eligibility is the test of the State's right to tax or the homesteader's acquirement of an equitable interest, but to show that the foundation did not exist on which could be enacted the final act, which alone could endow the homesteader with an equitable interest, and the State with the right to tax.—That final act being the making of final proof and the issuance of final Certificate.

Until the making of Final Proof and the acceptance of such proof as evidenced by the issuance of the Final Certificate, the homesteader had no interest whatever in the land, legal or equitable, and the State Taxation Laws could not apply. As was said by Mr. Justice Brewer, in Stearns vs. Minn. (45 L. Ed. 177):

"Until the very last moment that liens or equitable right of the United States are extinguished, no matter how trifling or small may be the right of lien reserved, the land is not subject to taxation."

The right to tax can only apply where the right to

patent is *complete*, the equitable title *fully vested*, without *anything* more to be paid or any *act to be done* going to the foundation of the right. As was held by Mr. Justice Miller, of the United States Supreme Court in N. R. R. R. Co. vs. Rockne, (115 U. S 600, 29 L. Ed. 477):

"Again, it is said that since the road was built before the tax was levied and the Company had earned the land, its equitable title was complete, and according to the decisions of this court it was subject to taxation.

The same point was urged in R. Co. vs. Prescott, but the court said that 'this doctrine was only applicable to cases where the right to the patent is complete, the equitable title fully vested, without anything more to be paid or any act to be done going to the foundation of the right.' But it added, in that case, that two important acts remained to be done; the failure to do which might wholly defeat the company's title. One of these was payment of the costs of surveying. * * *"

In all instances where the question has come before the Supreme Court of the United States and in all instances in the Federal Government Courts, with the exception of one which will be noticed presently, it has been uniformly held, as suggested previously, that until the making of Final Proof and issuance of Final Certificate, homesteads are not taxable.

Hussman vs. Durham, 165 U. S. 143, 41 L. Ed. 664;

Shiver vs. U. S., 159 U. S. 492, 40 L. Ed. 231;

Diver vs. Friedheim, 43 Ark. 203;

U. P. R. R. Co. vs. McShane, 22 Wall. 444, 22 L. Ed. 747; 7 N. W. 468;

Hutchings vs. Lowell, 15 Wall., 77, L. Ed. 82;

Pitts vs. Clay, 27 Federal 635;

Clear Water Timber Co. vs. Sho Shone County, 155 Fed. 612;

U. S. vs. City of Milwaukee, 100 Fed. 829;

Kansas Pac. R. R. Co. vs. Prescott, 16 Wall. 603, 21 L. Ed. 373.

The importance of performance by the entryman was dwelt upon in the last case cited, wherein it was said:

"While we recognize the doctrine heretofore laid down by this court, that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right. * * *"

The title to the homestead lands herein involved, being originally in the Federal Government, and not having passed therefrom at the time of the assessment of the taxes complained of, such taxes were invalid and unenforcable.

ISSUE II.

Can County taxing authorities of the State of Arizona, indirectly tax homestead lands entered under the United States Homestead law, previous to the fixing of the farm unit for the reclamation project within which such entries lie, and before the compliance by said homestead entrymen with the requirements of the United States Homestead Law as to the payment of fees due the United States Government for said lands, reclamation, irrigation, cultivation or improvement thereof, by attributing to said entrymen an "equity" in such homestead lands and thereupon taxing said equity, selling said home-

stead lands, and delivering possession thereof to purchasers at tax sales?

POINT 1.

Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the rights, privileges and immunities of the claimants respecting public lands are to be measured by the acts of congress, departmental administration and regulations, and judgments and decisions of Federal Courts; and it is not for the States to declare what the policy of the Federal Government, with respect to public lands, shall be.

The State of Arizona cannot in any manner change the nature, value or characteristics of a homesteader's rights—That is a prerogative of the Federal Government. It is for Congress alone to determine what rights the homesteader has with respect to land entered by him. In the case of Gibson vs. Chouteau (13 Wall 92, 20 L. Ed. 534) cited ante Point 2, Issue I, it was said:

That Congress alone has the power of disposing of any making rules and regulations with respect to the public Domain; That this power is subject to no limitations. That no legislation can in any manner interfere with the right of congress or embarrass its exercise.

The court in that case said further:

The same principle which forbids any state legislation interfering with the power of congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the Possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees

can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in congress if these benefits, which should follow upon the acquisition of that title could be forfeited because they were not asserted before that title was issud. * * *"

This question of the effect of entry of public land was again discussed in the case of Bagnell vs. Brodrick, (13 Peters 430, 10 L. Ed. 235) and the court held:

Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal government, in reference to the public lands, declares the patent and superior and conclusive evidence of legal title; until its issuance, the fee is in the government, which by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment. * * *

The question of descent of property acquired under the public land laws of the United States in the State of Washington, and the nature of the title thereto was examined by the United States Supreme Court in the case of McCune vs. Essig, (199 U. S. 382, 50 L. Ed. 237) and the holding of the court was as follows:

"The action of the lower courts on the motion to remand and on the merits are attacked by appellant to a certain extent on the same ground; to-wit, that the laws of Washington determined the title of the parties, not the laws of the United States. The interest in McCune, acquired by his entry, it is contended, was community property, and passed to appellant under the laws of the State. Sections 4488, 4489, 4490, and 4491, of the Statutes of Washington provide that property and pecuniary rights owned by either husband or wife before marriage, or that acquired afterwards by gifts, bequests, devise, or

descent, shall be separate property. Property not so acquired or owned shall be community property, and, in the absence of testamentary disposition by a deceased husband or wife, shall descend equally to the legitimate issue of his or their bodies. 1 Ballinger's Anno Codes & Statutes. Replying on these provisions the argument of appellant is, and we give it in the words of the counsel: "When William McCune entered this land he had not the legal title, but he had an immediate equitable interest and the exclusive right to possession until forfeited by failure to carry out the terms of his entry. United States vs. Turner, 54 Fed. 228.

"The terms of his entry were carried out. The patent issued by reason of his entry. The state legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the state law would have no effect upon the title to the land. That equitable interest ripened, and was confirmd by the patent."

But this is begging the question. What interest arose in McCune by his entry, who could, upon his death, fulfill the conditions of settlement and proof, and to whom and for whom title would pass, depended upon the laws of the United States. Bernier vs. Bernier, 147 U. S. 242, 37 L. Ed. 152, 13 Sup. Ct. Rep. 244. The motion to remand was rightly overruled. On the merits we think the ruling of the lower courts was also right. Hutchison Invest. Co. vs. Caldwell, 152 U. S. 65, 38 L. Ed. 356, 14 Sup. Ct. Rep. 504. Hoadley vs. San Francisco, 94 U. S. 4, 24, L. Ed. 34, and other cases relied on by appellant, are not in point. * * *"

The contention of appellant reverses the order of the statute, and gives the children an interest paramount to that of the widow through the laws of the state.

The law of the state is not competent to do this. * * *"

Clearly the foregoing cases indicate.

That a State cannot by legislation or otherwise charge a homesteader with a title to public land which he does not possess; and that a State cannot by legislation or otherwise interfere with, diminish or alter an entryman's rights upon public lands. To the same effect are the following cases:

Rector vs. Ashley, 6 Wall. 152, 18 L. Ed. 733;
Gobbins vs. Comm. of Erie County, 16 Peters 435, 10 L. Ed. 1022;
U. S. vs. Rickert, 188 U. S. 432, 47 Ed. 532.
U. S. vs. Gatoit, 14 Peters 526, 10 L. Ed. 573;
State vs. Bachlder, 5 Minn. 223, 8 Am. Dec. 410.

Can the nature, dignity and effect of the right accorded by the Federal Laws be changed by the legislation of the State of Arizona? Emphatically we say it can not. Calling the right an "equitable interest in land," by the state authorities, can in no wise affect the homesteaders rights.

POINT 2.

There is no analogy between a "homesteader's right" and an "equity," nor between the "right" of a homesteader and an "equitable interest."

The word, "equity" is variously used: Sometimes to indicate an "estate," sometimes an "interest," somemtimes a "right" and sometimes to indicate a system of jurisprudence.

However, these various terms have a recognized meaning in the legal and equitable jurisprudence of our country.

"The words, 'estate' is clearly distinguished from an 'equity,' for 'estate' and 'equity' are not synonomous either in meaning or substance."

Tweksbury vs. Readington, 8 N. J. Law (3 Halst.) 319.

The words, "equitable estate" are synonomous with "equitable interest" and mean such interest as can be enforced only in a Court of Equity.

Avery's Lessees vs. Dufrees, 9 Ohio (9 Ham.) 145.

There is no such thing as an "equitable title." What is commonly designated as an "equitable title" consists of but a mere right in the party to whom it belongs, to have the legal title transferred to him, he having an "equitable interest" to estate in the property, the legal interest to title being in another.

Thygerson vs. Whitback, 5 *Utah* 406, 16 *Pac.* 403.

An equitable estate is acquired by operation of "equity," such as the estate of a person for whose use or benefit lands are held in trust, by another having the legal estate.

Brown vs. Freed, 43 *Ind.* 253.

"In law the legal estate is the whole estate, and the holder of the legal title is the sole owner, but this title may be held for the beneficial interest of another, which interest has come to be called, an equitable estate. It is not however, strictly speaking, an interest in the land itself, but a right which can be enforced in 'equity.'"

In Re: Qualifications of Electors, 19 R. I. 387, 35 Atl. 213.

It is plain from examination of the foregoing authorities that the Homestead right is neither an "equitable interest" or "equitable estate," nor an "equitable right" or "equitable title."

It is not an "equitable right," but a "statutory" one. It is not an "interest" or "estate" in the land and therefore cannot be an "equitable interest" or an "equitable estate."

The nature of the Homesteader's rights, under the United States Homestead Law, are important in the consideration of this case, any may, we believe, be here profitably noticed:

The Foundation of the Homestead Right.

The foundation right of the homesteader's right and the measure thereof are found in the act itself.

Rector vs. Ashley, 18 L. Ed. 735.

Inception of the Homestead Right.

The "Making of a Homestead Entry" means the act by which an individual acquires an inceptive right to a portion of the unappropriated public lands of the United States.

Chotard et al. vs. Pope, 6 L. Ed. 737.

It consists of a declaration of the intention to subsequently acquire title to the land selected by performing the conditions required by the Homestead Laws.

40 Land Decisions 206.

Nature of Right of Pending Proof.

Pending the making of final proof the entryman has but an inchoate right which may ripen into a vested interest and title by complying with the homestead law, has the right to occupy the land and to make such use thereof as is not in conflict with the spirit and purpose of the act. He may transfer his right by relinquishment for the benefit of one equally qualified, or mortgage for improvement, but cannot transfer by deed or except through the United States Land Department, nor incumber the land except for the one purpose. The legal and equitable title meanwhile are vested in the Federal Government.

Hussman vs. Durham, 165 U. S. 145, 41 L. Ed. 664;

Shiver vs. U. S., 159 U. S. 493, 40 L. Ed. 231;
Witherspoon vs. Duncan, 4 Wall. 210, 18 L. Ed. 399;
147 Mo. 238;
123 Ala. 627;
58 Iowa 163.

Nature of Homesteader's Right After Making of Final Proof.

When all things required under the Homestead Law have been performed and done, and all fees due the government have ben paid, then the entryman first acquires a vested interest in the land and is said to have an equitable title. The government still retains the legal title but pending the issuance of patent following Final Proof, the restrictions and inhibitions of the Homestead Law cease.

Kansas Pacific R. R. Co. vs. Prescott, 16 Wall. 603, 21 L. Ed. 373;
Union Pacific Ry. Co. vs. McShane, 22 Wall. 444, 22 L. Ed. 747.

Nature of Homesteader's Right After Making Final Proof and the Issuance of Patent.

The issuance of patent is the final act of the government and vests for the first time a complete and perfect title in the entryman.

Fisbie vs. Whitney, 9 Wall. 187, 19 L. Ed. 668;
Bagnell vs. Brodrick, 13 Peters 436, 10 L. Ed. 235.

The Department of the Interior has at all times held and maintained that a homesteader's rights to reclamation homesteads were absolutely controllable by the Land Department Officials until the making of final proof and the issuance of final certificate and in a case involving the right of a reclamation home-

steader to improvements placed upon a portion of his entry which was not included in the portion as finally alloted to him after the farm units were finally reduced to the farm area for the project such improvements made prior to the establishment of the farm unit were held to be absolutely at his own risk. 137 Land Decisions 718).

In the case of Fisher vs. heirs of Rule (40 Land Decisions, page 63) the United States Land Department said:

"Indeed, the making of an original homestead entry amounts to no more than a declaration by the claimant of intention to acquire the land in the manner prescribed by the statute, and bears substantially the same relation to the final acquisition of title as does the declaratory statement to a purchase under the pre-emption law. By neither the one nor the other is any vested right acquired as against the Government. See Whitney vs. Taylor (158 U. S., 85, 95). Following the uniform rule of cases adjudicated under the pre-emption law, it must be held that, under the homestead law a declaration of intention, never acted upon, to acquire public land by residence thereon, confers no inheritable right to complete the entry without settlement on the land."

Again in the case of Oscar O. Reeg, the question of a homesteader's rights was considered and it was held by the Land Office Officials on an appeal to the Commission of the General Land Office, (40 Land Decisions, page 267):

"The initial entry was merely a declaration of intention to acquire title to the land by performing the conditions required by the homestead laws. By such entry a settler is protected against intrusion by other settlers, but as against the Government his right is only conditional and inchoate. Whitney vs. Taylor (168 U. S., 85, 95); Frisbie vs. Whitney (9 Wall., 187).

To acquire any right against the Government by such filing or entry, it is incumbent upon a claimant to establish by sufficient proof, to the satisfaction of the land department, which may prescribe the character of such proof and the manner of its submission that he has fulfilled the conditions required by the homestead laws and is entitled to a patent for the land. Until such proof has been submitted and final certificate issued no right vests in claimant, and hence there is no room for the application of the rule that a forfeiture of title should not be declared ,except upon clear, positive and convincing proof."

The Homestead right cannot be assimilated to the *terms* of the law or equity courts, being purely a statutory creation and to the statute we must look for an understanding of its nature, its value and restrictions. Its nature, its value and its restrictions as imported by the Act in question, cannot be changed by calling it an "equity" in land, or any other name. The most favorable assimilation possible would be that of a vendee after the payment of the purchase price. The assimilation being relegated to a time when the homesteader has made his final proof and received his Final Certificate, but even such an assimilation is not possible because the Government still retains the right to recall the certificate and cancel the entry.

The Homesteader may look to the law courts for protection against trespassers upon his possession, but as to all other matters, he must look to the Land Department for redress. Neither the law courts nor the equity courts have any jurisdiction whatever over his title. Until it passes from the Federal Government, his right is measured alone by the Homestead Act and not by the remedies of courts of equity.

In discussing the rights of the Homesteaders, the United States Supreme Court in Shiver vs. United States, (159 U. S. 402, 40 L. Ed. 231) said:

"While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands, by the first appropriation, or that they cease to be the property of the government. Upon the contrary, it was said by this court, as early as 1839, in Wilcox vs. Jackson, 38 U. S. 13 Pet. 498, 516 (10:264, 273), that "with the exception of a few cases, nothing but the patent passes a perfect and consummate title." So, in Frisbie vs. Whitney, 76 U. S. 9 Wall. 187, 193 (19:668, 671): "There is nothing in the essential nature of these acts" (entering upon lands for the purpose of pre-emption) "to confer a vested right, or, indeed, any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right." In this case, the following extract from an opinion of Attorney General Bates was quoted with approval: "A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege to pre-emption. But this is only a privilege conferred on the settler to purchase lands in preference to others. . . . . His settlement protects him from intrusion or purchase by others, but confers no right against the government." A number of authorities were cited to the same effect. It was held that it was within the power of Congress to withdraw land which had been pre-empted from entry or sale, though this might defeat the imperfect right of the settler. In Hutchings vs. Low ("The Yosemite Valley Case") 82 U. S. 15 Wall. 77 (21: L Ed. 82), the construction given to the pre-emption law in Frisbie vs. Whitney was approved, the court observing p. 88 (85): "It is the only construction which preserves a wise control in the government over the public lands, and prevents a general spoilation of them under the pretense of intended pre-emption and settlement. The settler, being under no obligation to continue his settlement and acquire the title,

would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the government, a convenient protection for any trespass and waste in the destruction of timber or removal of ores which he might think proper to commit during his occupation of the premises."

The right which is given to a person or corporation, by a reservation of public lands in his favor, is intended to protect him against the actions of third parties, as to whom this right in the same may be absolute. But as to the Government, his right is only conditional and inchoate. By the Homestead Act, (Rev. Stat. 2289) certain classes of persons therein specified are entitled to enter a quarter section of land subject to pre-emption at a certain price, upon making an affidavit of facts, (2290) before the register or receiver, including in such affidavit a statement that "his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person." By a later Act, adopted in 1891, (26 Stat. at L. 1098), this affidavit is now required to state that the settler "will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as the agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of any land entered, or any part thereof, or the timber thereon." By Section 2291, no patent shall issue until the expiration of five years from the date of the entry, the settler being required to prove by two credible witnesses that he has resided upon or cultivated the land for such term of five years immediately succeeding the time of filing the affidavit, and that no part of such land has been alienated, except for certain public purposes. By Section 2297, if, before the ex-

piration of the five years, the settler changes his residence or abandons the land for more than six months at any time, the lands so entered shall revert to the government; and by Section 2301, the settler may, at any time before the expiration of the five years, obtain a patent for the lands by paying the minimum price therefor, and making proof of settlement and cultivation, as provided by law, granting pre-emption rights.

From this resume of the Homestead Act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; second, that such property is subject to devestiture, upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the Acct. * * * * * ."

Where the question of taxation of public lands involved relations less vital to the enjoyment of statutory rights granted have come before the courts, it has been uniformly held that not only is public land exempt from taxation but that the exemption extends to all interests therein. Neither the land nor any interest whatever being taxable for any purpose.

County of Chase vs. Shipman, 14 Kans. 532, Book 27 Pac. State Reports 405.

Commissioners Douglas County vs. U. U., Kans. 616, Book 25 Pac. State Reports 374.

Kansas Lumber Co. vs. Jones, 32 Kans. 105.

U. S. vs. Rickert, 188 U. S. 432, 47 L. Ed. 532.

Territory of New Mexico vs. U. S. Trust Co., 172 U. S. 171, 43 L. Ed. 407.

People ex rel McCrea vs. U. S., 93 Ill., 30, 34 Am. Rep. 155.

The name under which a right, privilege or property is taxed is not the determining factor in the valid-

ity of the tax. To call a statutory privilege an "equity" does not make such right or privilege taxable unless it is of the nature and possesses characteristics of property which is made expressly amenable to the taxing power of the State. "Churches," under the laws of Arizona, are exempted from taxation; "Halls" are not. Will any have the temerity to argue that by calling a Church a hall, it is thus rendered a subject of taxation? This, we cannot believe. Similarly, if a homesteader has not in fact an "equitable interest" in his homestead land, the State of Arizona cannot accord him or endow him with such an interest for the purpose of reaching the interest thus created, for the purposes of taxation.

Point 3.

The substance and effect only, and not the form of an act, is to be regarded, and where, as in the case of Arizona Statutes, make the taxes assessed a lien upon the property; provide that an action for the collection of taxes is in the nature of an action in rem; for a sale of the property assessed to satisfy the tax lien; and for the delivery of possession of such property to the purchaser thereof; such assessment and tax levy and the procedure outlined constitutes taxation of the land involved, regardless of the guise adopted to conceal the tax levy.

Par. 4845, Arizona Statutes, makes the taxes a lien upon the property assessed, in the following words:

"Every tax levied under the provisions or authority of this act upon any real or personal property is hereby made a lien upon the property assessed, which lien shall attach on the first Monday in January in each year, and shall not be satisfied or removed until such taxes, penalty, charges, and interest are all paid, or the property has absolutely vested in a purchaser under a sale for taxes. Said lien shall be prior and superior to all other liens and encumbrances upon the said property."

Paragraph 4010 provides what the judgment in tax suits will be.

"The judgment, if against the defendant, shall describe the real estate upon which the taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the state be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest, and cost, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said real estate. If two or more persons, firms, or corporations are joined in one suit, the judgment shall describe in separate paragraphs the real estate of each defendant and each paragraph shall contain the other matters required in case of a judgment against a single defendant. In such case the costs of the suit shall be aportioned among the several defendants and such proportion of the costs shall be adjudged against each defendant as the amount of taxes due from him bears to the total amount of taxes for which judgment is rendered. In such case the judgment shall direct a separate sale of the property belonging to or assessed in the name of each of the defendants and the execution shall contain a like direction; provided, however, that all property sold under the provisions of this act shall be subject to redemption, in the same manner and time as is now provided by law for redemption under execution sale. The clerk of the Superior Court shall, upon application of the county treasurer or the county attorney, issue the execution herein provided for, describing the real estate named in the judgment, and directed to the sheriff, and commanding him to levy upon, advertise, and sell said property or so much thereof as may be necessary to pay said judgment and subsequent costs, the same as the sheriff might do under ordinary execution."

This makes an action for the collection of taxes in the nature of an action in rem.

Paragraph 4920 provides for the execution of a deed by the sheriff in tax sales and the delivery of possession to the purchaser.

"The sheriff shall execute to the purchasers of real estate, sold under this act, a deed for the property so sold, which shall be acknowledged before some officer authorized by law to take acknowledgments of deeds, as in ordinary cases, and which shall convey a title in fee to such purchaser of the real estate therein named and shall be prima facie evidence of title and that the matters and things therein stated are true. In case any person shall be in possession of the real estate which may be sold as herein provided, the Superior Court, or the Judge thereof, upon application, shall cause a writ of possession to be issued, placing the purchaser, or his assigns, in possession."

The foregoing are the only provisions of the statutes prescribing the procedure for enforcement of taxes against real estate.

Provision for the sale of the possessary right to non-patented mining claims is made, but no such provision appears for the sale of possessary rights to homesteads.

The paragraph in question provides (4901):

"In case the mine or mining claim shall not be patented or entered for patent, but shall be assessable and taxable under the act on account of producing net or gross profits, then in that case the possession shall be the subject of assessment * * *"

The foregoing provisions are the only ones made for the enforcing of taxes against real estate. Defendants state that it was not their purpose, and that they did not intend to sell the land of the entryman. It being their stated purpose and intent to sell the entryman's right to possession of his homestead, which

right to possession they denominate and "an equity" in the land. For this latter procedure we maintain there is no provision in the law.

We have seen from the foregoing provisions of the Arizona Statutes that with respect to real estate the land is taxed; the taxes made a lien thereon; and such taxes collected by a sale; that such sale passes a fee to the land and that the sheriff is empowered and directed to dispossess whoever may be upon the land and deliver possession thereof to the purchaser.

The force and effect of the provisions in question and the procedure therein outlined effectively, unreservedly and tenaciously siezes and holds the land itself for the taxes assessed against the same; subsequently sells this land, dispossesses whoever may be thereon, completely terminating and extinguishing all rights of such previous possessor and delivers possession thereof to the person to whom the land is sold.

If this be not taxing the land we can conceive of no legislation which constitutes a tax against land. The same procedure is followed under the Arizona Statutes in the sale of private lands and homesteads as yet unearned. Obviously the pretended difference between taxing the right to possession of the land and taxing the land itself, in so far as the homesteads are concerned, is a distinction without a difference.

There is no analogy between the taxation of a miner's franchise and the homesteader's right to possession.

This right of the homesteader is not to be compared to that of a miner upon mineral ground. Failure to distinguish between the miner and the homesteader in their relation to the Federal Government and the land entered has been the cause of confusion by some courts in discussing the question of taxation.

Previous to the enactment of the United States Mining Law, the state courts had been called upon to

adjudicate and define the rights of miners in the mineral lands of the the public domain. These courts took the stand that the franchise to explore and extract mineral from mineral land *was something separate and apart from the land itself*, and as such could be transferred, inherited and taxed. Exercise of this franchise was dependant upon possession, and a sale of the franchise was affected by sale of the possession.

When Congress came to enact legislation upon the subject, (see par. 3969 to 4023, inclusive, Barnes Federal Code, page 966, Act of May 10, 1872, c. 152, Sec. 1, 17 Stat. 91) it adopted almost in its entirety the existing law as developed by the decisions of the state Courts.

It gave the locators an absolute right to possession and enjoyment, (Par. 3974, Barnes Federal Code); it left the administration of the law in the hands of state authorities, (par. 3976 Id.); it also left the determination of the right to possession in the hands of the state legislature and the state courts, (par. 3979 Id.); it left to the jurisdiction of the state courts the power to determine the rights of conflicting claimants to mineral lands and expressly provided that the fact that the fee was in the United States Government should not affect any such proceedings, (Act of Feb. 27, 1865, c. 64, 13 Stat. L. 441, Sec. 910, Revised Stat. U. S., page 35, Vol. 5 Federal Stat Ann).

In the subsequent decisions of the Federal Courts the nature of this franchise, its prerogatives and limitations as determined by the State Courts was recognized.

Duggin vs. Davey, 4 Dak. 110;
Belg vs. Meagher, 104 U. S. 283, 26 L. Ed. 736;
Davidson vs. Calkins, 92 Fed. 230;
24 Ore. 265;
St. Louis Mining Co. vs. Montana Mining Co., 171 U. S. 650, 43 L. Ed. 320;

Garcey vs. Con. Mining Co., 94 U. S. 762, 24 L. Ed. 313.

It has been said by the United States Supreme Court, (Van Allen vs. Assessors, 3 Wall. 513, 18 L. Ed. 222), with reference to taxation, that:

"A sovereignty in whose interest an exemption exists is fully protected as it controls in respect to taxation, and it may in its discretion permit itself or agents, or its own property to be taxed by the other under limitations prescribed by itself as the Federal Government has permitted the states to tax the National Banks, as they tax other monied corporations within their jurisdiction."

Hence the Government recognizing the mining franchise as property entirely subject to state regulation and jurisdiction has adopted the state construction of the taxability of such property. The courts holding such franchise to be property in direct opposition to the holding of Federal Courts in regard to a homesteader's right, which has repeatedly been declared not to be in property, but a conditional and inchoate right.

Arizona has taken advantage of the permission of the Federal Government and provides for the taxation of mining claims and mines, (c. 12 Revised Stat., 1913), but it provides for a different method of procedure for the taxation of such property than for the taxation of lands, and with regard to sales expressly provided, (Par. 4991):

"In case the mine or mining claim shall not be patented or entered for patent, but shall be assessable and taxable under the act on account of producing net or gross profits, then in that case the possession shall be the subject of assessment. * * *"

We find no such provision for the sale of homesteader's right and the reason is apparent to all,—

Such a right is not subject to taxation. It does not, like the franchise to explore and extract metals, exist separately and apart from the land itself, and hence is not taxable.

The very essence of the tax enforcement provision of the Arizona statutes, with respect to real estate and interest therein, is the passing of title and the delivery of possession—A complete extinguishment of all rights of the former possessor or owner, except the rights of redemption within the statutory time. Can it then be argued that despite the foregoing provisions and the effort of the procedure outlined that it is not the land but the right to possession which is taxed? Manifestly not, and this without regard to what the guise adopted may be.

In the few instances in which possessors rights have been held taxable an examination of the cases will show that such taxation was asserted only because the rights claimed were claimed under State Possessory Laws, and not under the United States Homestead Laws. The assessment in such cases not being in derogation of any rights claimed under the United States Public land laws.

The question whether a state taxing law contravenes the Federal Constitution does not depend on any mere question or form, construction or definition but upon the practical operation and effect of the tax imposed.

Galveston, H. & S. R. Co. vs. Texas, 210 U. S. 234, 52 L. Ed. 1031;
Shaffer vs. Carter, 40 S. Ct. 221.

POINT 4.

The right of possession accorded to a homestead entryman is measured and determined solely by the Federal law previous to the issuance of final receipt and not by state legislation.

Each and every right or privilege which he enjoys with respect to his homestead entry is predicated upon the United States Homestead law and the regulations issued thereunder.

Balsz vs. Liechenaw, 4 Ariz. 227;
Zimmerman vs. McCurdie, 15 N. D. 70, 12 Ann. C. 20;
Warkros vs. Cowan, 13 Ariz. 42.

A homesteader, in so far as his land is concerned, is dependent for possession alone upon the homestead law and so long as he complies with such law, he is entitled to possession thereof without interference by State authorities. (Zimmerman vs. McCurdie, ante; Spoat vs. Durland, 2 Okla., 24) to the same effect of the cases cited ante herein.

Gibson vs. Chouteau, 20 L. Ed. 534;
McCune vs. Essig, 118 U. S. 382, 50 L. Ed. 337;
Bagnell, et al vs. Broderick, 12 Peters 436, 10 L. Ed. 435;
Rector vs. Ashley, 6 Wall. 142, 18 L. Ed. 733;
Dobbins vs. the Commissioners of Erie County 16 Peters 435, 10 L. Ed. 1022;
U. S. vs. Rickert, 188 U. S. 432, 47 L. Ed. 532;
U. S. vs. Gratoit, 14 Peters 526, 10 L. Ed. 573;
State vs. Bachelder, 5 Minn. 223, 80 Am. Dec. 410;
2 Minn. 153.

Such being the law, we contend that the homesteader's right to occupancy of the land entered by him cannot be interferred with in any manner by the State of Arizona, either by dispossessing him under a tax sale, or otherwise.

POINT 5.

The assessing of taxes, by state authorities upon

Government homestead lands entered under the provisions of the United States Homestead laws, which become a lien against the lands for the satisfaction thereof, and the sale and delivery of such lands for the satisfaction of the taxes thereby imposed and existing as a lien against the lands, constitutes an interference with the operation and enforcement of the United States Public land laws.

We have sought to show in our argument heretofore, point 2, Issue II, that any rights growing out of a homestead entry are statutory rights accorded the homesteader under the Statutes of the United States. These rights were granted to homesteaders to subserve the ends of the National Government. If the intended and proper exercise of such rights is necessary for the subservance of any National purpose, it follows as a legal proposition that they cannot be interferred with by the State of Arizona.

The proposed action of the defendants, if permitted, would make impososible the administration of the homestead law.

For illustration under the Act of May 14, 1880, (ante Point 4, Issue II) provision is made for contesting a homesteader's right to land, the successful contestant being given a preference right to enter the land within a certain number of days after decision by the Interior Department, and under this personal right, and the making of an entry, he is entitled to possession of the land. How can the possession which it is proposed by the defendants to give the purchaser at a tax sale, be reconciled with the rights of such successful contestant?

By the provisions of the Homestead Law, (See Suggestions to Homesteaders and persons desiring to make Homestead Entries, Sections 21 to 24, inclusive (Ante Point 4, Issue II) upon the death of a Home-

stead Entryman, the right to perfect the entry passes to the widow, or his heirs, who are entitled to the possession and enjoyment of the entry, or may be released from residence upon the land. A tax sale would plainly make this provision of the Homestead Law inoperative.

The homesteader has the right to transfer his entry by relinquishment to a person equally qualified to complete the requirements for title thereto. The presentation of the relinquishment entitles the bearer to enter the land in his name. This right would be utterly defeated by a tax sale.

Again if the state authorities can tax before the making of final proof, then they can tax the moment after the entry is made, thus preventing the homesteader's compliance with the law, and rendering absolutely inoperative Public Land Laws.

Possession of a homestead is imperative in order to comply with the requirements of the Homestead Law as to residence, cultivation and improvement. If this possession can be taken away from the homesteader under state legislation on any pretext whatever, then the Homestead Law can be absolutely nullified, and the power and authority for disposal of the public lands vested in Congress by the Constitution is rendered inoperative. We might continue to multiply illustrations tending to show that taxation of homestead lands under Arizona Statutes, which pretend to, and do in fact, pass both title and possession if anything, is an interference to with the operation of the United States Homestead Law.

The homesteader's right is somewhat analogous to the rights accruing to the holder of a corporate franchise, or of patent rights, or an office under the United States Government. In comparison, the rights are dependent upon an act of Congress exercised by virtue of power granted by the Federal Constitution.

and a taxation of these rights by the states, wherever the question has been raised has been held invalid.

The case of California vs. Central Pacific Railway Co. (127 U. S. 27, 32 L. Ed. 150) involved the right of the State of California to tax a franchise granted to a railroad company, by the United States for the construction of a railroad across, among others, states of California and Arizona, and the court there held such a franchise to be beyond the taxation power of the state.

"Assuming, then that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the Company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the Company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." 2 Com. 37. Generalized, and devested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power, of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and cus-

toms of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the Legislature direct or derived. These are franchises, no private person can take anothers property, even for a public use without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in McCulloch vs. Maryland, 17 U. S. 4 Wheat. 316 (4:579), "the power to tax involves the power to destroy." Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in McCulloch vs. Maryland, supra; Osborn vs. Bank of U. S. 22 U. S. 9 Wheat. 738 (6:204), and Brown vs. Maryland, 25 U. S. 12 Wheat. 119 (6:678) and in numerous cases

since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decision of this court in Thompson vs. Union Pac. R. R. Co., 76 U. S. 9 Wall. 579 (19:792), and Union Pac. R. R. Co. vs. Peniston, 85 U. S. 18 Wall. 5 (21:787). As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. 85 U. S. 18 Wall. 35, 37 (21:793).

In Indian Territory Aluminating Oil Co. vs. State of Cal. (240 U. S. 523, 60 L. Ed. 779), the question of a state's right to tax the corporate assignee of an oil and gas lease of Osage lands made under the authority of the Act of February 28, 1891 (26 Stat. L. 794 c. 383, Comp. Stat., 1913, Sec. 4195) which recognized the assignment and included in such tax levy the lease and rights thereunder was involved, and the court there held that such rights under such leases were not taxable. The court in commenting upon such leases said:

"A tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them. If they cannot be taxed as entities, they cannot be taxed vicariously by taxing the stock whose only value is their value, or by taking the stock as an evidence or measure of their value rather than by estimating them as the Board of Equalization and the referee did."

In Chocataw O. & G. R. Co. vs. Harrison (235 U. S. 292, 59 L. Ed. 234), the State of Oklahoma levied taxes upon the gross sales of coal dug from mines belonging to the Chocataw and Chicksaw Indians which it leased and operated. These leases were made pursuant to an agreement between the Government and the tribes in question, which provided that their lands should remain common property of the members

thereof; that the revenues derived from the land should be used for the education of their children; the mines to be under supervision and control of a trustee appointed by the President and subject to rules prescribed by the Secretary of the Interior. The State of Oklahoma maintained that it should levy upon the gross receipts of such property represented, merely the measure of the value of the property liable to a general asssment. But the court held the tax to be an occupation tax; that the corporation taxed was the instrumentality through which the purpose of the government was carried into effect and that such agency could not be subjected to an occupation or privilege tax by a state.

The case of Dobbins vs. Commissioners etc. 16 Peters 435, 10 L. Ed. 1022 involved the right of the State of Pennsylvania to assess an officer of the United States for his office, the Court held:

"The compensation of an officer of the United States is fixed by a law made by Congress. It is in its conclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land."

The right of a State to tax patent rights envolved in the case of Com. vs. Philadelphia Company, 157 Pa., 537; Com. vs. Edison Electric Light Company, Id. 529, and the court there held that the capital stock of a corporation, which is issued for patent rights merely and not for any tangible property or goods

manufactured under such patents, is not taxable by the State. In rendering the opinion of the Pennsylvania Court, Judge McPhearson cited the case of Cal. vs. Central R. R. Co. Supra, denying the power of the State to tax a corporate franchise granted by Congress, unless Congress consents. The same reasons which operate to require a denial of State taxes or franchises granted to corporations by Federal authorities were held equally applicable against State taxes on patent rights.

The same conclusion was also reached by the Federal Courts In re Sheffield, 64 Federal 835. Hollida vs. Hunt 70 Ill. 712, 22 Am. Rep. 65.

Similarly in the case of Telegraph Co. vs. Texas (105 U. S. 466, 26 L. Ed. 2068), taxation of telegraph messages sent or received by the Federal Government was held invalid on this principle.

In Searight vs. Stokes (How. 7178, 11 L. Ed. 530) toll imposed on mail coaches was declared void in so far as Federal agents were concerned.

In every instance where the principle of Federal supremacy, within the National legislative sphere, has been involved, the courts have sustained the principle that no state has power, by taxation or otherwise, to in any manner control operation of laws enacted by congress within the scope of its constitutional powers, and this inhibition extends as well to any state legislation tending to retard, impede or burden such national legislation, in any measure.

People ex rel vs. Assessors 156 N. Y. 410, 51 N. E. 270;

U. S. vs. Texas 143 U. S. 646, 36 L. Ed. 293;

Hiawatha Blatchford pr. 12 F. C. 6451;

Hawkins vs. Filkins 24 Ark. 300.

The principle involved herein and sustained by the foregoing authorities is but a reiteration of fundamental constitutional law as enunciated by Chief Justice Marshall in the case of McCulloch vs. State of Maryland et al (4 Wheat 316, 4 L. Ed. 579) and the law as there declared applies with equal force in the present case.

"If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the paper of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. This did not design to make their government dependent on the states.

Gentlemen say they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction

between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is an empty and unmeaning declaration. * * *"

The considerations, which impelled the above mentioned courts to deny taxes in the illustration given, would seem to apply with even greater force against State taxation of a homestead right, especially under enforcement proceedings dispossessing the homesteader as in Arizona.

We have carefully examined the holdings of the various state and District courts and find but two cases, which are not in harmony with the principles as announced by Courts, in the cases cited.

An examination of the holdings of the courts in the jurisdiction mentioned, (Idaho), will, we respectfully submit with all due deference to the authorities concerned, be found contrary without reason, to the accepted holdings. Initially, the proceedings mentioned, seem to have been in the nature of a friendly suit in which state taxing authorities sought to levy taxes against federal property. The federal government having interposed an objection, the Idaho officials denied any desire or intent to tax federal property and the decree properly established exemp-

tion of the same. The proceeding being similar to a suit to quiet title where the defendant disclaims any right, title or interest in or to the land involved and nothing remains but to enter judgment for the plaintiff. The real parties in interest—The taxpayers, were not before the court. Nevertheless, the court seemingly proceeded to an adjudication of their rights and in the course of this proceeding, seems to have partially adopted the proposition for which we herein contend, viz: That only a "vested interest" is taxable, but then proceeded to hold that by reason of the right of assignment accorded Entrymen, title had become vested and hence the property taxable. Entirely in our opinion, overlooking the real test by which the question should have been decided to-wit:

Whether all the acts and the making of all the payments required under the public land laws have been made and done by the entrymen.

The Court seems to have been much more influenced by the authorities relating to the taxation of a miner's franchise than by the numerous and well considered cases relative to taxation of homestead entries. The concluding authority cited (Wisconsin Cen. R. Co. et al vs. Price Co. 133 U. S. 496, 33 L. Ed. 687) did not sustain the Court's conclusion, but on the contrary plainly sustains the holdings of the cases here'n cited. In that case the court held:

"It follows that all the public domain of the United States within the State of Wisconsin was in 1883 exempt from state taxation. Usually the possession of the legal title by the Government determines both the fact and the right of ownership. There is, however, an exception to this doctrine with respect to the public domain, which is as well settled as the doctrine itself, and that is that, where Congress has prescribed the conditions upon which portions of that domain may be alien-

ated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent and until such issue holding the legal title in trust for him, who, in the meantime is not excluded from the use of the property—in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property—then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation. * * *"

Under the power vested in him, the Secretary of the Interior prescribes the rules governing the acquirement of title within the various reclamation projects. As conditions vary in the various projects, the project regulations are not uniform—In some the farm unit is established from the outset instead of being postponed as in the Salt River Valley Project. The facts are not developed but it is entirely probable that special conditions existing within the project concerned, may explain the divergent holdings of this jurisdiction.

In no other jurisdictions as far as we have been able to ascertain, have homesteads or any interest or rights therein been declared taxable under any form or guise previous to the issuance of final certificates.

For the reasons stated we submit that the taxes levied, and the procedure for enforcing the same, con-

stitute an interference with the operation of the United States Homestead Law.

ISSUE III.

Can the County taxing authorities of the State of Arizona under the laws of that State retroactively for a period of years antedating their official incumbency, by ex parte resolution, levy taxes against homestead lands entered under the United States Homestead Law before the establishment of the farm unit for the reclamation project within which such lands lie, and before compliance by such homestead entryman with the requirements of the United States Government for the obtaining of title to said lands as to payment of fees due the Federal Government for such lands and the reclamation, irrigation, cultivation and improvement thereof and before the making of the final proof or the issuance of final certificates for said lands?

POINT ONE

No provision exists in the statutes of Arizona for the taxing of any right or privilege of homesteaders in or to homesteads entered under the United States Homestead Laws apart and separate from the land before making of final proof for such entries.

The property is classified under other provisions of the code as follows:

"In the construction of the statutes of this state, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say": * * *

"The words "real property" are co-extensive with lands, tenements and hereditaments."

"The words 'personal property' include money, goods, chattels, things in action, and evidence of debt." (Par. 5552).

"The term 'real estate' whenever used in this act shall be taken to mean and include the ownership of, or claim, to, or possession of, or right of possession to, any land or patented mine within the state; and the claim by possession of any person, firm, corporation, association, or company, to any land or patented mine shall be listed under the head of real estate. Real estate and improvements thereon shall be separately assessed. The term 'personal property' whenever used in this act shall include, money, goods, chattels, choses in action, evidence of debts, and any interest or equity in or valid claim to non-patented mining claims, either lode or placer; and shall be deemed and taken to mean, and it is hereby declared to mean and include all property of whatsoever kind or nature, both tangible and intangible, not included in the term real estate, as said term is defined in the section. All personal property in the hands of any trustee, agent, administrator, executor, or receiver, and all personal property mortgaged or pledged, shall for the purpose of taxation, be deemed to be the proprty of the person who has the possession thereof. Whenever solvent debts are assessed, the person assessed may deduct therefrom his liabilities." (Par. 4847).

For the different subjects liable to taxation, specific provisions are made by the code. Chapter VIII, title 40, for instance, governs the taxation of Express Companies; Chapter IX of the same title provide car lines; Chapter X of the same title provides for railroad property; Chapter XI of the same title provides Telephone and Telegraph lines; Chapter XII of the same title provides for Mines and Mining property; Chapter XIII provides for inheritance tax and Chapter XIV of the same title provides for school taxes.

The provisions of such statutes with which we are here concerned, relate to the assessment of taxes on real property and interests therein, and the mode pro-

viding for the enforcing of collection of such taxes assessed against real property and such interests.

The first of the provisions designating the property which shall be subject to taxation is followed by the provisions defining property. A subsequent provision (Par. 4839) describes the kinds of property upon which taxes shall be assessed.

"There shall be levied annually upon the real and personal property within this state, such a sum or sums of money as the legislature may by law provide and deem to be sufficient, with other sources of revenue, to defray the necessary ordinary expenses of the state for each fiscal year, and any deficiency which may have accrued from any previous year or years, and such further sum or sums as shall be necessary to pay the interest and principal of the bonds of state, as provided by law; * * *" (Par. 4839).

Paragraphs 4845, 4919 and 4920, (Cited Ante Point 3, Issue 2), together with Paragraphs 4917 and 4918, provide that taxes levied are a lien upon the property assessed; provide for the bringing of suit for the collection of taxes within six months after the same become due; provide that suit shall be brought in the name of the State as plaintiff; provide for a judgment foreclosing the lien and directing a sale of the real estate; and requires the sheriff to deliver possession of the land to the purchaser and for dispossession of the owner or possessor.

Paragraph 4846, (Cited Point 1, Issue 1) provides that all property within the State shall be subject to taxation except certain enumerated classes among which is property belonging to the United States Government.

We are sensible of the inherent power of taxation in a sovereign state and of the comprehensiveness of

the foregoing statutory provisions. We are aware that the broad power of the state to levy taxes for the affairs of the state, and the public welfare must not be hampered or restricted, but in spite of its scope, this power is subject to well recognized limitations and must be exercised in conosance with established principles of the laws of governing taxation.

Primarily, legislation must be provided for subjects which are to be taxed—the subjects selected alone being for the time, taxable.

Sec. 3, Art. IX, Ariz. Const.
City of Newport vs. Klatch, 224 S. W. 844;
City Council vs. St. Phillips Church, 1 McMul. Eq. 139;
Martin vs. Charleston, 13 Rich. Eq. 50;
Levy vs. Smith, 4 Fla. 154;
Brewer County vs. Brewer, 60 Maine 62;
Butlers App., 73 Pa. St. 448;
State vs. County Court, 19 Ark. 36;
State vs. Alston, 94 Tenn. 647;
Bartholemew vs. Austin, 87 Fed. 359.

The mere statutory declaration that certain property shall be subject to taxation is insufficient and indefinate, unless the statute goes further and prescribes a mode of taxation and a mode of enforcing the tax when levied.

State vs. Chamberlain, 37 N. J. L. 388;
Neary vs. Phila. R. Co., 7 Houst. (Del.) 419, 9 Atla. 405;
Webster vs. People, 98 Ill. 343;
Virginia aetc. R. R. Co. vs Wash County 30 Gratt. (Va.) 471.

The provisions of the statutes mentioned, do not, nor do any others, provide for the assessment of taxes

against homesteads for which final certificates have not been issued.

We have seen (Point 3, Issue 2) that the Statutes of Arizona provide for the sale of the possessory right to unpatented mining claims and enacts that where the claim is unpatented the possession shall be the subject of assessment, in which case only the right to possession is sold.

We have further shown that the right to exemption, which the Federal Government might claim as to mineral lands, has been waived and that the franchise to explore and extract mineral from mineral land was regarded as something separate and apart from the land itself. Hence the right of the State to assess, tax and sell such franchise. But that no such franchise has ever been recognized in homestead lands and for this very reason we find no provision for the taxation of right of possession, separate and apart from the land, and indeed, the Statutes of Arizona permit of no such procedure.

The State of Arizona is possessed of thousands of acres of public land given to it under the Enabling Act, admitting the State into the Federal Union. This land is being leased to settlers who have possession, occupancy and enjoy the same. Under the constitution, land of the state is exempt from taxation; no attempt is made to tax the possession of these lessees, despite the fact that they enjoy possession of the land. If possession of the land were taxable, manifestly those lessees would be entitled to no greater consideration than the homesteaders, and the taxation of the homesteaders would amount to a denial of the equal protection clause of the 14th amendment.

The laws of the State of Arizona with reference to taxation of lands for all practical purposes have remained the same ever since the organization of Arizona

as a Territory. No amendments material to the question under discussion have been made.

Acting upon dicta in certain early cases the tax authorities at one time assessed homestead lands, levied taxes thereon, and sold same under tax sales. This action besides conflicting with Section 1851, Revised Stat. of the United States, page 254, Vol. 7, Federal Stat. Ann., which was then a portion of the organic law of the Territory of Arizona, (Par. 15 Organic Law, Page 74, Revised Stat. 1901), was also recognized as being contrary to constitutional law independent of legislative enactment as announced by the United States Supreme Court in Van Brooklin vs. Tenn. (117 U. S. 151) consequently no purchasers appeared for such lands, and sales were made to the then Territory of Arizona. The illegality of the action of the taxing authorities was recognized by the 16th Territorial Legislative Assembly, which in 1893 declared such transfers to the Territory to be void. The act is as follows:

AN ACT

"Declaring the Title obtained by the Territory of Arizona by Tax Deeds for Taxes assessed against Government land prior to the Issuance of the Final Receipt by the United States Land office to be void.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF ARIZONA:

SECTION 1. That all tax deeds heretofore executed to the Territory of Arizona to lands belonging to the United States Government for taxes assessed thereon prior to the date of the final proof and the issuing of the final receipt by the United States Land Office, for such land, is hereby declared to be void, and any title which the Territory of Arizona has in or to any such lands, by virtue of any such tax deed or deeds is hereby declared by

operation of this Act to be conveyed and reinvested in the owner or owners of said land or lands.

SECTION 2. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed and this Act shall take effect and be in force from and after its passage.

Approved April 5, 1893." (Oct. 47 Sess. L. 189, p. 37).

Such a construction by the Territorial Legislature is a conclusive ascertainment of the public policy of this state against the taxation of homestead lands.

Raisor vs. Chicago, 215 Ill. 47, 74 N. E. 69;
McFadden vs. Blocker, 3 Ind. Terr. 224, 54 S. W. 873.

POINT 2.

The homesteader's right to possession of their respective homesteads being, by the taxing authorities, denominated an "equity in" such homesteads and classified as entangible property, as such, does not admit of any rational or uniform admeasurement of value so as to make possible a just apportionment of the tax which is a constitutional requisite of all ad valorem taxation such as the authorities levied upon the alleged property in question.

Section 1, Article 9, Constitution of Arizona, provides inter alia that, "all taxes shall be uniform upon the same class of property within the territorial limits of the authorities levying the tax and shall be levied and collected for public purposes only * * *"

Par. 4849, c. Title 40, Revised Statutes of Arizona, 1913, provides:

"All taxable property must be assessed at its full cash value. The term 'full cash value' whenever used in this act shall mean the price at which property would

sell if voluntarily offered for sale by the owner thereof, upon such terms as such property is usually sold, and not the price which might be realized if such property was sold at a forced sale."

Provision is made in the Statutes for standards of valuation and methods of assessment of the different kinds of property which are made subject to taxation, viz:

Par. 4868 gives the standard and method for taxing water ditches, toll roads, etc. The assessment of transient animals is governed by Par. 4869, 4870 and 4871. Chapters 8, 9, 10, 11, 12, 13 and 14, Title 48, Revised Statutes of Arizona, 1913 prescribe the standard and method of assessing express companies, private car lines, railroad property, telegraph and telephone, mines and mining property, inheritance tax and school tax. Chapter 5, Title 49, prescribes the standard of taxing real and personal property.

In no place, however, is a standard or method provided for the assessment of a homesteader's right to possession of his homestead, and the reason is obvious—The taxation of such a right is not contemplated under the Statutes of the State, hence no standard or method is prescribed.

On January 5, 1920, after the time for levying taxes and for a meeting of the board of equalization, the board of supervisors, by an ex parte resolution without notice or hearing, undertook to change the record of previous assessments against the homestead lands in question, and they thereby proceeded to assess the homesteader's right to possession. (Printed Record, Par. 5, Defendant's answer, page 23).

It will be observed (see Back Tax Bill, defendants' exhibit No. 1, Printed Record, page 60) that the officials did not change the valuation as found upon the records, when they attempted to change the same.

They contented themselves with writing in before the description of the real estate the words "equity in." This land had previously been valued and assessed at a fixed valuation. This tangible property against which ad valorem taxation had been made was taken as the standard and method for assessing the alleged intangible property represented by the homesteader's right to possession of his Homestead Entry. A standard and method which we maintain was neither a rational or uniform admeasurement of values as to make possible any just apportionment of the tax. In Stuart vs. Palmer (74 N. Y. 183, 30 Am. Rep. 289) the court said:

"It is not disputed that the legislature has unlimited power (except as restrained by the Federal Constitution) to impose taxes and assessments for public purposes. It may impose taxes upon all property within the State; and in such cases the owners are supposed to receive a compensation for the burdens thus imposed in the protection and benefits of the government under which they live.. It may impose taxes upon local divisions of the State for the purposes of local government, and all the citizens residing in the locality must bear the burdens, as they all receive the benefits of the local government. It may cause or authorize local improvements to be made and authorize the expense thereof to be assessed upon the land benefitted thereby. But in all cases there must be apportionment of the burdens, either among all the property owners of the State, or of the local division of the State, or the property owners specially benefitted by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding benefit for the excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed, without reference to some system of just apportionment, could not be upheld."

The authorities are numerous and unanimous to the effect that a standard of value and a rational and uniform method must be provided for the valuation of property assessed, and where no such system is provided and an arbitrary standard and system is followed, such taxation does not constitute due process of law.

Wells Fargo vs. Crawford County 63 Ark. 576. 37 L. R. A. 371;
People ex rel & Delaware R. R. Co. vs. Clapp et al, 152 N. Y. 490, 39 L. R. A. 237;
Ellis vs. Fraser (Oregon) 53 L. R. A. 454;
Kansas City R. R. Co. vs Road Improvement District etc. 65 L. Ed. 715, No. 17 Advanced Opinion, 715;
Marsh vs. Clark County, 42 Wis. 502.

In the present case there is no pretense on the part of the defendants that any valuation was ever made or any equalization attempted. The taxing authorities simply took the values which had previously been fixed for the real estate and adopted them as the value of the respective rights of the homesteaders to their respective homesteads. This we maintain was unequal, arbitrary and unreasonable and in violation of the due process and equal protection clauses of the 14th amendment to the United States Constitution.

POINT 3.

The assessing of the homesteaders right to possession made by ex parte resolution of the tax authorities of Maricopa County, Arizona, on January 5th, 1920, without notice or hearing to or of the taxpayers concerned, was in violation of the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

Since the action of the Board of Supervisors, changed the tax assessment from the "homestead land"

to an alleged "equity in," then such action if it accomplished anything, constituted and was intended as an assessment, under which notice to the taxpayers concerned was essential to due process of law.

In passing upon this question, the Supreme Court of New York, (Stewart vs. Palmer, ante, Point 2 Issue 3), seems to us to have well stated the application of the due process clause of the 14th Amendment:

"It is difficult to define with precision the exact meaning and scope of the phrase, "due process of law." Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller of the United States Supreme Court, to leave the meaning to be evolved "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Davidson vs. Board of Administrators of New Orleans, 96 U. S. 97; s. c., 17 Albany Law Journal, 223. It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this. In his argument in the Dartmouth College case, 4 Wheat 519, Webster defined "due process of law" as a proceeding "which proceeds upon inquiry and renders judgment only after trial." Mr. Justice Edwards in Westervelt vs. Gregg, 12 N. Y. 209, defines it as follows: "Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." Judge Cooley in his work on Constitutional Limitations, at page 355, after saying that "due process of law" is not confined to ordinary judicial proceedings but extends to all cases where property is sought to be taken

or interfered with, says, that "due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That "due process of law" requires this has been quite uniformly recognized."

Paragraphs 4877 and 4892, Revised Statutes of Arizona provide:

"On or before the twentieth day of May of each year, the assesor shall complete the assessment roll, as required by law, and shall attach his certificate thereto, and deliver it with a cross index, made by him, of the real estate and mines assessed therein, showing the ownership thereof, and all original lists of property given to him, to the clerk of the board of supervisors, which shall be filed in the office of said clerk. As soon as he receives said assessment roll, the clerk of the board of supervisors shall give notice of the fact, specifying therein the time of the meeting of the board of equalization, by publication in some newspaper, if there be one published in the county, and if none, then in such manner as the board of supervisors shall direct; and he shall keep the roll open in his office for public inspection. * * * (Par. 4877).

"As soon as the board of supervisors shall finally have determined the estimate provided for herein, they shall proceed to assess taxes for the amount estimated upon the taxable property of the county, according and in proportion to the individual and particular valuation as specified in the assessment and tax roll for the year; they shall compute and carry out in separate money columns the real and personal taxes and totals of taxes to each person, or name, and shall carefully foot up the

several taxes therein levied, and the same shall constitute the assessment and tax roll for the year; and no informality in complying with the requirements of this act shall render any proceeding for the collection of taxes illegal. Upon completion of the assessment and tax roll, the chairman of the board of supervisors shall immediately annex thereto, under his hand, a warrant, commanding the county treasurer to collect from the several persons named in said roll the total taxes set opposite their respective names, on or before the second Monday in December then next. The board shall immediately charge the county treasurer, in a book kept for that purpose, the totals of all taxes levied on said roll. The said assessment and tax roll and also the cross index, provided in Sec. 39 (Par. 4877) hereof, shall be delivered to the county treasurer on or before the third Monday in September. Hereafter the term "roll" whenever used herein, except when otherwise specifically provided, shall mean the assessment and tax roll as constituted in this section." (Par. 4892).

The homestead taxpayers concerned, had the same right to be heard in the proceeding of January 5th, 1920, as in the making of an original assessment. This right was denied to them and their homestead right was assessed arbitrarily, unreasonably and without any notice or hearing.

The principles announced in Stuart vs. Palmer, Ante, have been consistantly recognized and followed by the Supreme Court of the United States as well of the Court of every State where the point has been presented.

Hager vs. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663;
Kentucky R. Tax Cases, 115 U. S. 321, 29 L. Ed. 414, 6 Sup. Ct. Rep. 57;

Winona & St. P. Land Co. vs. Minnesota, 159 U. S. 526, 537, 40 L. Ed. 247, 251, 16 Sup. Ct. Rep. 83;
Lent vs. Tillson, 150 U. S. 316, 35 L. Ed. 419, 11 Sup. Ct. Rep. 825;
Glidden vs. Harrington, 189 U. S. 255, 47 L. Ed. 798, 23 Sup. Ct. Rep. 574;
Hibben vs. Smith, 191 U. S. 310, 48 L. Ed. 195, 24 Sup. Ct. Rep. 88.
Security Trust & S. V. Co. vs. Lexington, 203 U. S. 323, 51 L. Ed. 204, 27 Sup. Ct. Rep. 87;
Central R. Co. vs. Wright, 207 U. S. 127, ante, 134, 28 Sup. Ct. Rep. 47.

There was nothing in the previous notices given, or in the records as they formerly stood, which in any manner apprised the homesteaders that their right to possession of their respective homesteads was taxed. The fact that the homestead land entered by them, title to which was still in the Federal Government had been taxed was not notice that the homesteader's right to possession was taxed or proposed to be taxed. The taxation of the homestead land itself was obviously illegal and an act which might be ignored by them until an attempt at its enforcement by the bringing of suits, was made by the county taxing authorities. Certainly then, it cannot be said with any foundation in law or in fact that the homesteaders had any opportunity to be heard concerning the attempted taxation of their homestead right; and for this reason, the taxation of the homestead rights was in violation of the due process clause of the 14th Amendment.

ISSUE IV.

Can County taxing authorities of the State of Arizona, under the laws of that State by an ex parte resolution, after the institution of a suit to restrain the collec-

tion of taxes on Homestead Entries under the U. S. Homestead Laws, and after the service of process upon such County authorities and the making of previous transfers of such Homestead land to bona fide assignees under such County tax records as originally made, without notice to, or a hearing of the taxpayers concerned, alter or change, retroactively for a period of years antedating the inception of their official incumbency, the assessment or Tax Records of such County, which records as originally made disclosed that such homestead lands had been assessed and taxed precisely as any other lands in private ownership previous to and prior to compliance with the United States Homestead Laws by the entrymen thereof as to payment of fees due the Fedral Governmnt or the making of final proof and before the issuance of final certificate therefor, by assessing an alleged "Equity" of Entrymen in the lands involved?

POINT 1.

The County assessment or tax rolls of Arizona, are subject only to the correction of manifest clerical errors by the officials responsible for the same, and during their term of office, and can not be changed upon the recollection of officials, or upon the testimony of third persons, or by persons who were not the incumbents of offices or responsible for the records involved at the time the same were made.

A tax on property levied in proportion to its value must be a formal act of assessment consisting of, First: The listing of the property and its inclusion of the tax roll, and second: The valuation of the property so included. (Larson vs. Dickey, 30 Neb., 463, 58 N. W. 167, 42 Am. St. Rep. A. S. R. 595). This assessment must be the formal act of an officer or officers elected or appointed for that express purpose and must be made a matter of record so that the owner of the property assessed may have the means of defi-

nately ascertaining the fact that his property has been assessed; a description thereof, and the amount of assessment. (Ill. Central R. R. Co. vs. Ky. 218 U. S. 551, 54 L. Ed. 1147; Larson vs. Dickey, supra..

Defendants base their right to change the county tax records upon paragraph 4026 Arizona Code which reads as follows:

"The County treasurer shall make diligent endeavor to collect all taxes upon said "back tax book," and whenever he finds that any taxes therein have been paid, he shall report that fact to the county board of supervisors, giving the name of the officer or person to whom such taxes were paid, and he shall also report to the said board all cases of double assessment or other errors, and thereupon said board shall cause the necessary action to be taken and entries to be made."

This paragraph, it will be observed, simply provides for the correction of errors appearing on the record—Not for the making of a new record, or changing the record of what has actually been done, or making of a new assessment as was attempted in this case. It refers to clerical errors solely and not to changes in substance.

It will be conceded that pending the completion of the assessment and tax roll for any given year and its authentication by the designated officials, such assessment and tax roll is subject to amendment and correction by the tax officials of the county, but it is the contention of the plaintiff that after the completion of such assessment and tax roll and its proper authentication, no changes or alterations can be made thereon, except manifest clerical errors. Such clerical errors, we maintain, can only be made by the officials responsible for the same, and during their term of office.

It must be borne in mind that the present defendant County officials have presumed to change not

only the assessment and tax records for the past year, prepared and made up during their own incumbency in office; they have gone further than this and have presumed to interpret the intention of their predecessors in office for a period extending back in the neighborhood of 10 years, some of whom are dead and all of whom have ceased to have any official connection with such assessment or tax records.

If they can do this, and they can go back for a period of 10 years, they can go back for a period of 50 years and there would be absolutely no limitation upon alteration of the County assessment an dtax records and absolutely no stability or certainty of property titles.

Regarding certain matters and within proper limits, a correction of the assessment record may be made to conform such records to the facts; but such corrections must be made upon authority expressly conferred, and the authority exercised must not go beyond the power granted. Nothing is to be taken by intendment.

Furthermore, the change made was not a change by the assessor who is charged with the making up of the assessment record, but by an entire stranger to the assessor's office, viz, the county Treasurer upon the authority of an ex parte resolution by the County Board of Supervisors.

Parol Extrinsic evidence cannot be received to vary or contradict the particulars set forth in an assessment list or roll, nor can the records be altered upon the testimony of a third person, or by one who is no longer in office.

Watt vs Reynolds, 27 Vermont 206;
Hartwell vs. Littleton, 13 Pick 229;
Saco Water Power Co. vs. Buxton, 98 Main 205, 56 Atla. 914.

After the completion and return of an assessment roll, the assessor has no further control over it, and has no authority to alter or amend it, except as to correction of mere informalities or clerical errors.

Fulton vs. Fuller 33 Mich. 199;
Johnson vs. Malloy 74 Calif. 430, 16 Pac. 228;
Ill. S. R. R. Co. vs. People 215 Ill. 123, 74 N. E. 97;
Cleveland etc. vs. Ensley 44 Ind. App. 538, 89 N. E. 607;
Gibbons vs. Adamson 44 Kans 203, 24 Pac. 51.

This practice of "altering records when a controversy has arisen to meet a particular case," has been repeatedly condemned by the Courts. Says the Supreme Court of Vermont (Hadley vs Chamberlain, 11 Vermont 618):

"The defendant justifies the taking for which the action was brought, as collector of school district No. 5, in Waterford, by virtue of a warrant and rate bill. Several questions have been made in the case, and, indeed, cases of this nature are unusually prolific of litigated and curious questions at least. The first point presented is whether the defendant, Chamberlain, was collector.

It appears, that, when the records of the district were first producted to show this appointment, and they were insufficient for that purpose, the defendant, Chamberlain, who was or had been clerk, then made the alteration mentioned in the bill of exceptions. It is undoubtedly the duty of all recording officers to see that the proceedings of the corporations are correctly recorded, but the practice of amending and altering the records, when a controversy has arisen, to meet a particular case, or in consequence of a decision of the court, cannot be defended, and the case before us shows the impropriety of such procedure. The

records, as they were first made, undoubtedly showed what the district intended, whether it was legal or not."

The same conclusions have been reached by the courts by other States.

McGrath vs. Wallace 116 Calif. 548;
Ferenna vs. Sunnyside Land Co., 124 Calif. 437;
Turner vs. Town of Pewee Valley 38 S. W. 143;
Hager vs. Hall 159 N. Y. 552, 54 N. E. 1092.

POINT 2.

The Statutes of Arizona, relating to the correction of errors "in the back tax book" of the County Revenue records, authorizes only correction of clerical errors appearing on the record, and where the tax recods corectly record the acts of County taxing officials in Arizona, such acts cannot be undone by changing the records thereof

For a period extending over 10 years, the lands in question had been annually assesed as private lands, and a record of such assessments made. Suits had been brought to collect the taxes assessed against this homesteads upon the records as made. These record showed conclusively that the homesteads had been assessed. The right of the tax authorities to levy taxes upon homestead land for which final proof had not been made, having been questioned by the appellant in the present suit, and process having been served upon defendants; then for the first time the suggestion of the assessment of the homesteaders "equity in" the lands was made to appear upon the assessment roll by an ex parte resolution of the Board of Supervisors. Manifestly this proceeding could validate nothing.

The proceeding of January 5th, 1920, was not intended as a correction, nor so designated. It was an attempt to change the record of the action which had previously been taken by the County assessor.

The very back tax bill attached as defendant's exhibit, (page 60 of printed record) shows that the taxes were assessed against the land and so remain on the record. The recital of the treasurer's certificate being that the taxes in question "are delinquent and wholly due and unpaid on that certain real and personal property situated and located in said county and state and hereinafter described. Said property being assessed in the name of the persons in favor of the several funds and for the respective amounts set opposite thereto, all as shown by the Back Tax Book, being part of the official records in my office, * * * then follows a description of the different tracts of land.

The County assesor having at all times assessed these lands in precisely the same manner as he had assessed other lands in private ownership, had made and entered on the assessment roll, a record of his action. This action of the assessor, the Board of Supervisors and the County Treasurer, after the bringing of this suit, determined to change. And the method which they adopted to change this past act was to pass a "resolution" directing the County Treasurer to insert preceeding the description of the Homestead land assessed, the words "equity"—All without notice to any of the taxpayers concerned. (Defendant's answer, Par. V., Printed record 23).

The proceedings of the board of supervisors in this case is analogous to the proceedings of a court of record in entering an order or judgment nunc pro tunc. The office of a judgment nunc pro tunc is to record some act of the court, done at a former time, which was not then carried into the record.

Cowdery vs. London etc. Bank, 139 Cal. 298, 73 Pac. 196;

Davidson vs. Richardson 50 Ore. 742 17 L. R. A. (N. S.) 319.

The power of a court to make such entries and, and by analogy, the power of the taxing authorities, is restricted to placing upon the record evidence of action which has been actually taken. It may be used to make the record speak the truth but not to make it speak what it did not speak but ought to have spoken.

Jacks vs. Adamson, 56 Ohio St. 397, 47 N. E. 48;
Lourance vs. Lankford, 106 Ark. 470, 153 S. W. 592.

POINT 3.

Tax records, when completed and authenticated, cannot be changed under circumstances where such change would operate unjustly upon the rights of parties who are justified in relying upon such records as found, and in determining from such records the legality of existing taxes and such parties cannot be prejudiced by the subsequent change of records.

From the first tax levies involved in this case up to the year 1919, in all instances the taxes for an entire 160 acres of land were assessed against each Homestead tract in the name of the original entryman.

Subsequent to the levying of taxes against the entire tract of each homestead, the Secretary of the Interior under the power vested in him, established the Farm Unit within the Salt River Project at 40 acres, thereby compelling the entrymen to reduce their holdings from 160 to 40 acres to conform to each Farm Unit. Numerous assignments have been made and the transfers incidental to reduction to Farm Units have taken place to persons qualified under the Homestead Law to complete such entries, since the levying of the taxes against the 160 acre tracts. Nevertheless each reduced Unit stands charged with the taxes for the whole tract, despite the fact that the possession and ownership has changed.

By the authority of the United States Supreme Court, and the exemptions recognized by the State, these lands were exempt from taxation during all these years of changes. To say that the records of the County can now be changed so as to charge the lands with taxes, alleged to represent an "equity" of persons not now in possession, is an anomaly upon the law which we do not think any Court will countenance as a rule of property law, or a matter of justice or "equity."

Tax records cannot be changed under circumstances where it could operate unjustly upon the rights of the parties. Persons have the right to rely upon the record as found and to determine from such record the legality of taxes assessed, and if such taxes are illegal and transfers occur, the parties dealing cannot be prejudicated by subsequent act of officials.

22 Eng. Rul. Cas. 824;
Jeudevine vs. Jackson, 18 Vt. 470;
Langon vs. Poor, 20 Vt. 13;
State vs. Phillips, 102 Mo. 664;
Blight 6 T. B. Morn. 192;
Jones vs. Tiffin, 24 Iowa 100.

CONCLUSION

We are, primarily concerned in determining whether taxes assessed against homesteaders' right to possession of homestead entries made under the United States Public Land Laws, before the making of final proof and the issuance of final certificates, constitutes an interference with the operation of laws enacted by Congress to carry into execution the powers vested in the Federal Government under Section 3, Article IV United States Constitution, relative to control and disposition of property belonging to the United States,

and whether if a state has the power to assess such rights, it has observed the requirements of the due process clause of Section 1, Fourteenth Amendment to the Constitution, with respect to notice and hearing, as a pre-requisite to a valid tax levy.

With the propriety of the Public Land Laws we have no concern and obviously neither has the state. It matters not whether the rights or property which Arizona has presumed to tax are worth One Dollar or Five Thousand Dollars. Except for jurisdictional purposes, these values are of no moment. The Federal Government might have waived its exemptions as it did with respect to the miner's franchise but since it has not elected so to do, the *necessities* of counties, communities, or states must be subordinated to the greater consideration of naitonal welfare. The principle of the supremacy of federal legislation within the scope of congressional powers must take precedence over every influence, local or state wide. This is the *sine quo non* of national sovereignty.

Incidental to the questions here suggested are other matters assigned and respectfully urged for the consideration of the court but the major question involved is the efficacy of national legislation. We confidently submit that the authorities cited under the points which we have respectfully presented sustain our contentions:

First. That title to the land involved had not passed at the time of assessment of taxes.

Second. That the levying of taxes against the right to possession was in truth and in fact a levy against the land itself.

Third. That the enforcement of the Arizona Statutes for the collection of taxes levied against the homesteaders' right to possession constituted an interference with the Public Land Laws of the Federal Government.

Fourth. That even if the foregoing propositions should be resolved against appellant, nevertheless, the state taxation power cannot be exercised consistently with due process of law, as in this case without according the taxpayers notice and an opportunity to be heard before the taking of steps imposing a liability for taxes upon their property.

We submit therefore that the judgment of the Honorable District Court should be reversed and here rendered in favor of the appellant and against the appellees, for all of which appellant prays.

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